Despite these difficulties, Zeitz crafted a trial strategy similar to one he had successfully employed in a previous capital case he tried in Pennsylvania -- introducing evidence in the guilty phase, some of which was of little or no relevance to guilt, but of significant relevance to mitigation.

First of all, respondent would take the stand at trial and not only deny his guilt, but also testify regarding his background, family life, and business and charitable activities, so that Zeitz would be able to humanize him. Zeitz himself would set the stage for this with an opening statement commencing with a description of respondent's life, derived from a biography respondent himself prepared. To show the bond and love between respondent and his sons, Zeitz intended to play during respondent's testimony the three tapes he recorded at the same time as he made the tape to his brother-in-law, as well as to introduce into evidence photographs respondent had with him that night. Zeitz would also have each of the boys testify, despite what they might feel about respondent's guilt; while their factual testimony would only be marginally relevant to the guilt phase, Zeitz hoped their testimony would create an image of support for their father. In addition to all this, Zeitz intended to present evidence of respondent's good character. Despite prosecutorial objection to some of this testimony, Zeitz was able to present his entire mitigation case in the guilt phase.

Nonetheless, the jury found respondent guilty at about 11:00 a.m. on March 5, 1986. While respondent, unknown to Zeitz, was being transported to a local hospital for examination, after fainting while being escorted out of the courtroom, Zeitz and the prosecutor discussed how the penalty phase would proceed. Zeitz, satisfied with the mitigating evidence he had presented in the guilt phase and having seen the powerful reaction in the courtroom to the playing of the tape recordings and the testimony of respondent's sons, agreed to forego the presentation of any further evidence; the prosecutor agreed to dismiss two of the

three aggravating factors, that the murder was especially heinous and that it was committed for pecuniary gain. Zeitz was aware that the former was likely unsupported by the evidence, but that the latter certainly was and with its dismissal the prosecutor could not argue it in aggravation. The two further agreed to keep their summations low-key and brief, thus avoiding any prosecutorial exhortation for the jury to impose the death penalty on respondent.

When respondent returned from the hospital, Zeitz explained the agreed-to penalty phase procedure. According to Zeitz, respondent declined to have his sons recalled, or to testify himself.

At the outset of his penalty phase summation, Zeitz argued that the jury should consider, in mitigation, respondent's lack of prior record and his character, including the evidence of his business and charitable activities. Zeitz also explained the State's heavy burden of proof. While he did not directly ask the jury to spare respondent's life, he later explained, at an evidentiary hearing before the district court, that he wanted the jury to feel empowered by emphasizing that each juror's vote on the verdict was an individual decision. For his part, the prosecutor kept his word, and gave an extremely brief and bland closing, never explicitly requesting a death verdict.

The jury unanimously concluded that respondent's lack of criminal history and the aforementioned background and character evidence constituted mitigating factors. However, it also found unanimously that these were outweighed beyond a reasonable doubt by the aggravating factor, that respondent had paid for Maria's murder, and sentenced him to death.

Respondent complained on both his direct appeal and during post-conviction proceedings in state court that Zeitz was constitutionally deficient during the penalty phase of his trial. On both occasions, without an evidentiary hearing, the

New Jersey Supreme Court rejected the claims. (428 F.3d at 457). See 11a to 12a.

The district court denied respondent's habeas petition, which raised numerous grounds for relief. On the issue of ineffective assistance of counsel in the penalty phase, the district court initially upheld the state court rulings, finding, also without an evidentiary hearing, that they were not unreasonable applications of *Strickland v. Washington*, 466 U.S. 668 (1984). *Marshall v. Hendricks*, 103 F.Supp.2d 749, 791-94 (D.N.J. 2000). See 12a. The court mirrored the sentiment of the state Supreme Court on direct appeal that it was unnecessary for counsel to present additional evidence of the mitigating factors at the penalty phase since such evidence had already been adduced during the guilt phase. *Id.* at 791-92. The court further determined that a number of respondent's other contentions, including that counsel should have consulted a mitigation specialist, and investigated further about respondent's "psycho-social history," "family dynamic," and potential for rehabilitation, were "far too speculative to show that the jury would have reached a different result." *Id.* at 792. Lastly, the district court concluded that counsel's penalty phase summation was not constitutionally deficient, agreeing with the state court's reasoning. *Id.* at 792-94.

The Third Circuit affirmed the district court's denial of habeas relief, with the lone exception of respondent's claim that he received ineffective assistance of counsel at the penalty phase. *Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002), cert. denied, 538 U.S. 911 (2003). The court reviewed the state court record pertaining to the penalty phase, and noted that respondent claimed that:

> 1. The penalty phase should not have commenced immediately upon Marshall's return from the hospital.

2. Zeitz presented no mitigation evidence (even though the judge instructed the jury to decide the existence of mitigating factors based on the evidence).

3. Zeitz failed to offer evidence to humanize Marshall, such as describing his childhood, his commitment to family, and his extensive community service.

4. Zeitz's statement to the jury was extremely brief and contained no request for mercy.

5. Zeitz never discussed the penalty phase with Marshall.

6. Zeitz never prepared for the penalty phase and conducted no investigation. [*Id.* at 98 (12a)].

The court viewed these claims as two broad categories: "(1) lack of consultation, preparation, and investigation by counsel, and (2) lack of content or substance in counsel's representation at the penalty phase." *Id.* at 98-99. 12a.

The court then reviewed each of respondent's claimed failures of counsel, and observed that in light of the then-recent decision of this Court in *Bell v. Cone*, 535 U.S. 685 (2002), it could not determine whether counsel's representation was deficient because "the picture is less than complete." *Id.* at 106. On the record before it, the court could not find, as this Court could in *Cone*, "that counsel's decision to offer a neutral and abbreviated penalty phase and no mitigation was a strategic move on his part[.]" *Id.* There was also no record of what preparation or investigation was done by Zeitz for the penalty phase, or why he chose not to undertake investigation. *Id.*

Because of its inability to determine whether counsel's performance was deficient, the Third Circuit analyzed, as had the New Jersey Supreme Court in rejecting respondent's claim, whether respondent was prejudiced. *Id.* at 107. The court also found that, without a hearing, it could not, nor could the state court, conclude that there was or was not a reasonable probability that but for any deficiency of counsel the result of the proceeding would have been different. *Id.* at 107-15.

The court stated that without an evidentiary hearing, including "input from the critical party Zeitz," petitioner's claim could not reasonably be adjudicated. *Id.* at 116. Thus, the Third Circuit remanded the matter to the district court for an evidentiary hearing. *Id.* at 117. 12a to 14a.

At the evidentiary hearing, Zeitz explained the formulation of his penalty phase strategy as outlined above. Nonetheless, the district court found that Zeitz's representation was deficient "because he failed to conduct *any* investigation into possible mitigating factors and provides no objectively reasonable justification for failing to do so." *Marshall v. Hendricks*, 313 F.Supp.2d 423, 443 (D.N.J. 2004). (emphasis in original). 80a. The district court faulted Zeitz for not having had "targeted discussion[s]" with potential mitigating witnesses, particularly respondent's family members, regarding testifying in the penalty phase. *Id.* at 443-47. 81a to 91a. The court further found that Zeitz's consultation with respondent was inadequate in that he "never specifically discussed the possibility, structure, or procedure of a penalty phase." *Id.* at 448-50. 92a to 94a. Both findings were made despite the district court's concession that respondent was a strong-willed client who "restricted Zeitz's ability to raise the possibility that he would be found guilty with members of the Toms River community or [respondent's] family." *Id.* at 450. 95a to 96a. The court went on:

> Ultimately, our review of Zeitz's conduct regarding his preparation for the penalty phase compels us to find that his representation was unreasonable under prevailing professional norms in 1986. The Court is satisfied that, at a bare minimum, Zeitz was required to have specific discussions with Marshall and his family members about the possibility of a penalty phase, what a penalty phase entails and a discussion with each person individually as to whether he or she would have been willing to testify and what he or she would have said. By failing to conduct any targeted investigation into potentially mitigating factors and neglecting to consult with his client, Zeitz failed to conduct himself as a reasonable attorney would. [*Id.* at 452-53 (101a)].

The district court further concluded that while no plea for mercy was required, Zeitz was deficient for not having made one. *Id.* at 454-55. 104a to 105a.

The district court also found a reasonable likelihood the presentation of further mitigating evidence would have resulted in a life sentence. *Id.* at 456. 108a. The court was particularly impressed by the "powerful and emotional testimony likely to have been given by [respondent]'s family," contrasting it with "Zeitz's sterile allusions to [respondent]'s community involvement and prior law abiding life." *Id.* 108a to 110a. Thus, the district court concluded, the New Jersey Supreme Court's conclusion that he was ineffective was an unreasonable application of *Strickland*. *Id.* at 457. 111a.

The Third Circuit affirmed the district court's grant of habeas relief, finding that there was "a total failure of Zeitz to prepare for the penalty phase of the trial." *Marshall v. Cathel*, 428 F.3d 452, 466 (3d Cir. 2005). 28a. Like the district court, the Third Circuit believed that Zeitz was required to specifically interview witnesses, including

respondent's sons, to have been effective: "it is Zeitz's failure to have discovered and/or spoken to these people in preparation for the penalty phase that constitutes fundamentally inadequate representation." *Id.* at 469-70. 34a to 35a. The court viewed the agreement made with the prosecutor as further evidence that Zeitz abdicated his role as counsel, since he had no witnesses to present even if the agreement had not been made. *Id.* at 472. 41a.

The Third Circuit also found that respondent had been prejudiced. The court stated that Zeitz's penalty phase argument regarding mitigating factors had only mentioned that he was law-abiding and had no prior record, and that he did not suggest anything related to New Jersey's "catchall" mitigating factor, *i.e.*, "any other factor which is relevant to the defendant's character or record or to the circumstances of the offense." *Id.* at 473. 43a to 44a. The court found that this factor was an invitation to offer reasons to spare respondent's life, which "were in the minds and voices of the witnesses not interviewed and thus never called, including [respondent]'s sons." *Id.* 43a. The Third Circuit saw Zeitz's "passing references to civic endeavors and attendance at swim meets" as being "more de-humanizing than humanizing" without witnesses in the penalty phase. *Id.* 44a. Although the jury had found the catchall factor to be present in mitigation, based on the mitigating evidence presented in the guilt phase, the Third Circuit said that this was "meaningless" because the factor's weight was affected by "the bland emotionless argument and lack of evidence offered by Zeitz." *Id.* 44a. The court concluded that the decision of the New Jersey Supreme Court was an unreasonable application of *Strickland*. *Id.* at 474. 45a.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Third Circuit that the Performance of Respondent's Counsel was Deficient Conflicts With This Court's Sixth Amendment Jurisprudence in that it Pays No Deference to Counsel's Stated Strategy and Imposes a Set of *Per Se* Rules Counsel was Required to Have Followed.

In *Strickland v. Washington*, 466 U.S. 668 (1984), and ever since, this Court noted the strong presumption that counsel has acted within the "wide range" of professional conduct and the deference which must be paid to counsel's explanation for his strategic decisions. The Court has further often cautioned against the placement of specific duties upon counsel in representing a criminal defendant. *Id.* at 688; see also *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
>
> Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants

> receive a fair trial. [*Strickland*, 466 U.S. at 688-89].

The Third Circuit's decision strays badly from these principles, first by paying no deference to counsel's strategic reasons, then by applying a series of *per se* rules to counsel's conduct.

The Third Circuit's ruling means that defense counsel in every case must have "targeted conversations" with potential mitigating witnesses, particularly with family members, even when the defendant forbids such conversations, particularly with family members. The court held that counsel must have such specific conversations with a capital defendant himself, regardless of that defendant's insistence on counsel's total commitment to his innocence. The Third Circuit effectively ruled that requesting an adjournment of a penalty phase is mandatory, regardless of the circumstances of the case, the attorney's strategic reasons for going forward, and his client's desire to do so. Despite the holdings of this Court that there is no absolute duty to do so, the court effectively held that mitigation evidence must be presented in the penalty phase, even when that presentation has already been accomplished in the guilt phase. Finally, the court's ruling means that there must be a plea for mercy in the penalty phase summation, despite a valid explanation for a low-key presentation. In applying these rules to counsel's conduct, the court overlooked what he actually did, and the circumstances under which he acted.

To begin, the court's characterization of this case as one involving a complete failure to investigate mitigating evidence is wrong. Counsel knew from the very beginning that this case, a potential murder for hire charge, could be a death penalty prosecution. From the beginning, the defense investigated both aspects of the matter, guilt and penalty. After respondent's alleged suicide attempt, counsel not only had petitioner examined by a psychologist, but also arranged

for petitioner's admission to a psychiatric hospital, with one eye on its potential guilt phase/defense implications and the other on possible fodder for mitigation. This investigative effort went for naught; reports from respondent's treating psychiatrist were extremely negative, that respondent was narcissistic, manipulative and had engaged in inappropriate and provocative sexual behavior at the hospital. Indeed, the doctor determined that respondent's depression stemmed from his breakup with his paramour, not from the death of his wife, a potentially devastating piece of evidence.

Counsel also looked into petitioner's military record as a possible source of mitigation. This idea disintegrated when it was learned that petitioner had been dishonorably discharged for falsifying documents while in the Navy. Obviously, using an exemplary military career as a mitigating circumstance was out of the question.

Nonetheless, the Third Circuit, echoing the district court, criticized counsel for failing to conduct "targeted" conversations with potential mitigating witnesses regarding testifying in the penalty phase. Counsel knew avenues of mitigation, *i.e.*, respondent's lack of criminal record, his character, and his business, civic, and social activities, existed, but he had to carefully approach a potential penalty phase under the restrictions placed upon him by respondent. That is, respondent forbade counsel from suggesting in any manner to his family, friends, and associates that he could be guilty of the murder of his wife. Thus, respondent's wishes effectively limited the amount of investigation counsel could do -- he could not have had a specific conversation with respondent's family members about possibly testifying at a penalty phase, without offending respondent's wishes.

In this context, a rigid requirement of conducting interviews with family members and others is not only contrary to *Strickland*'s warning against *per se* rules, it also conflicts with this Court's holding that it is proper for counsel

to make strategic choices on which investigatory avenues to pursue in light of information given to him by his client. *Id.*, 466 U.S. at 691.

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. [*Id.*].

See also *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004), cert. denied, ___ U.S. ___, 125 S.Ct. 1726 (2005), ("when a petitioner blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."). Counsel was not obliged to have "targeted discussions" with each and every potential mitigating witness, particularly since he was effectively not permitted to and in any event knew the types of information they could provide.

Nonetheless, despite respondent's wishes, counsel was able to pursue a mitigation strategy while not implying to those close to respondent that counsel had anything less than a complete belief in his client's innocence. For the Third Circuit to say that there was a "total failure" of counsel in preparing for the penalty phase, *Marshall*, 428 F.3d at 466

(28a), is simply contrary to the facts as explained by counsel and the circumstances under which he labored.

The Third Circuit also endorsed the district court's holding that once the guilt phase was over, counsel "had an obligation to request a continuance and conduct a penalty phase investigation." *Id.* 29a. A continuance was one option, but it was not the only one. To say it was the required decision once again ignores that what counsel did was a reasonable strategic choice under the circumstances, and is contrary to *Strickland.*

When counsel reached trial, he had more than sufficient information to enable him to make reasoned tactical decisions on how to proceed. As the trial progressed, events reinforced the notion that, strategically, he should go forward in the same manner in which he had successfully obtained a life verdict in a capital prosecution in Pennsylvania -- rely on evidence from the guilt phase as his penalty phase mitigation. As noted above, he was able to humanize respondent and elicit sympathy through respondent's testimony about his background and activities, the playing of the tape recordings, and the testimony of all three sons.

Taking this into account, counsel's decision to agree with the prosecutor to limit the mitigation to that presented in the guilt phase and to present brief and low-key summations was entirely reasonable. Indeed, the Third Circuit's criticism of this strategy is at complete odds with this Court's decision in *Bell v. Cone*, 535 U.S. 685 (2002). In *Cone*, this Court concluded that under the circumstances of that case, a capital defense attorney's strategic decision to forego the presentation of a mitigation case in the penalty phase, relying on mitigating evidence from the guilt phase, and to waive summation, was not unreasonable. *Id.* at 695-702. As the Sixth Circuit had in *Cone*, the Third Circuit has utterly failed to heed this Court's admonition that reviewing courts "must indulge a 'strong presumption' that counsel's conduct falls

within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Id.* at 702, citing *Strickland*, 466 U.S. at 689.

Despite the recognition in its earlier opinion that *Cone* was controlling on this case, the Third Circuit's lone citation to *Cone* is a fleeting reference to its holding that a plea for life is not required. *Marshall*, 428 F.3d at 465. 27a. Yet, the Third Circuit's ruling is the opposite, and fails to take all of the circumstances into account.

Counsel's summation was part of an agreement with the prosecutor, to respondent's great benefit, resulting in the dismissal of two of the three aggravating factors and the prosecutor's own limitation in arguing in favor of a death sentence. While the dismissal of the cruel and heinous aggravating factor was of little consequence since there was no evidence to sustain it, the inability of the jury to consider as additionally aggravating the fact that respondent had his wife killed for pecuniary gain, more than a million dollars in insurance on her life, was an enormous advantage to the defense.

That benefit was even more enhanced because the agreement ensured that the prosecutor would not, in contrast to his vigorous guilt phase summation, make a forceful argument in favor of a death sentence. Had the pact not been struck, the last thing the jury would have heard would have been the prosecutor loudly demanding a death verdict for the man who had paid a total stranger from Louisiana to kill Maria Marshall for the million dollars plus in life insurance that that man had himself bought for her. The impact of a closing argument emphasizing the confluence of these two aggravating factors, in the hands of a prosecutor already shown to be capable of aggressive summation tactics, is incalculable. Instead, what the defense got out of the deal was a closing argument, shorter than defense counsel's,

which was startlingly tepid, ending not with an exhortation, as in the guilt phase, for a particular verdict, but a bland request that the jury "continue with your deliberations and follow the law as his Honor instructs." Counsel's decision was little different than the decision to forego closing argument by the attorney in *Cone*.

Indeed, the requirement of any particular argument in summation, including a plea for the jury to spare a capital defendant's life, bears a strong resemblance to the Ninth Circuit requirement, rejected by this Court in *Yarborough v. Gentry*, 540 U.S. 1 (2003), that an attorney ask for an acquittal. Yet, *Gentry* does not even receive the cursory treatment afforded to *Cone* by the Third Circuit; it is not mentioned at all in the opinion. In *Gentry*, the Court observed that while the right to the effective assistance of counsel extends to closing arguments,

> counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. Judicial review of a defense attorney's summation is therefore highly deferential -- and doubly deferential when it is conducted through the lens of federal habeas. [*Yarborough v. Gentry*, 540 U.S. at 5-6 (citations omitted)].

The summation here was little different than that endorsed by this Court in *Gentry*. Like Gentry's attorney, counsel here made a low-key presentation, stressing the individual decision of each juror, *i.e.*, their autonomy. While

counsel did not beg for a life sentence, he argued in favor of the mitigating factors, indeed, successfully so, and emphasized the heavy burden of proof on the State, knowing that the judge would charge that the failure of the State to meet its burden would require a life sentence. "The issues counsel omitted [here, a plea for life] were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude." *Gentry*, 540 U.S. at 9.

The decision below turns this Court's jurisprudence on the effective assistance of counsel upside down. Paying no deference to counsel's explanation for the strategic choices he made and the circumstances which informed these decisions, the Third Circuit held that other decisions would have been wiser and in fact were required to have been made. The court's ruling is in conflict with the principles announced in *Strickland*, and ignores later caselaw applying them. For these reasons, this Court should grant the writ.

II. The Decision of the Third Circuit Conflicts With This Court's Jurisprudence on the Prejudice Prong of *Strickland v. Washington* in that the Omitted Mitigating Evidence was Merely Corroborative of that Presented By Counsel in the Guilt Phase and was Not Relevant to Respondent's Blameworthiness or Culpability.

In its Sixth Amendment jurisprudence in capital cases, this Court has repeatedly emphasized that persuasive mitigating evidence is that which diminishes the defendant's blameworthiness and moral culpability. This case involves nothing of the sort. Rather, the mitigating evidence which the court below found so powerful that its omission prejudiced respondent differs only in degree from that already presented in the case and was more likely to be viewed by the jury as enhancing, not reducing, respondent's culpability.

Respondent's counsel presented a mitigation case, in the guilt phase, that respondent was a successful businessman of good character, who engaged in many civic and charitable activities, and who loved his sons very much. Given that respondent did not have a disadvantaged background, troubled history, or mental disease or defect, it was the best case available. The Third Circuit below found prejudice, however, in that counsel had a number of other witnesses available, including several close family members and friends, who would have provided more evidence of respondent's character and activities. What the court is essentially saying is that emphasizing even more to the jury that respondent was a good man before he orchestrated the killing of the mother of his three children would have created a reasonable probability of a different result.

This prejudice analysis is entirely at odds with rulings of this Court on what type of mitigating evidence is so persuasive that its omission in a penalty phase of a capital

trial has prejudiced the defendant. *Wiggins v. Smith*, 539 U.S. 510 (2003), is illustrative of the kind of "powerful" evidence which tips the scales in the "reweighing" done as part of the prejudice analysis conducted in ineffective assistance cases:

> Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. [*Id.*, 539 U.S. at 535].

This Court found this to be "the kind of troubled history we have declared relevant to assessing a petitioner's moral culpability." *Id.* This is entirely consistent with the Court's prior caselaw. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than petitioners who have no such excuse."). Respondent had "no such excuse," and the mitigating evidence not presented here does not diminish his culpability to any extent.

Other cases decided by this Court echo *Wiggins'* theme. In *Williams v. Taylor*, 529 U.S. 369 (2000), the defendant was found by this Court to have been prejudiced because the defense failed to present evidence of Williams' "nightmarish childhood" and borderline mental retardation, versus the relatively trivial facts actually presented, that he had turned himself in and was remorseful and cooperative. "[T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. Thus, had counsel presented this evidence, there was a reasonable probability

that the result of the sentencing proceeding would have been different. *Id.* at 399.

Most recently, in *Rompilla v. Beard*, ___ U.S. ___, 125 S.Ct. 2456 (2005) this Court found prejudice in undiscovered mitigating evidence which would have demonstrated a horrible upbringing of which Rompilla's penalty phase jury was completely unaware:

> "Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags." [*Id.* at ___, 125 S.Ct. at 2468-69, quoting *Rompilla v. Horn*, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J. dissenting)].

Post-conviction testing by mental health experts found that Rompilla suffered extreme mental disturbance significantly impairing several of his cognitive functions, and that his

"problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.* at ___, 125 S.Ct. at 2469. Given how the undiscovered mitigating evidence might have influenced the jury's assessment of Rompilla's culpability, this Court, as it had in *Wiggins* and *Williams*, found a reasonable probability of a different result. *Id.* at ___, 125 S.Ct. at 2469.

Importantly, in *Rompilla*, this Court noted the contrast, missed by the court below, between evidence which truly affects moral culpability and evidence which, while mitigating, does not. The defense in *Rompilla* had presented a mitigation case remarkably similar to the one the lower courts envisioned as persuasive here, with family members seeking mercy and declaring that Rompilla was innocent and a good man, and, echoing the proposed testimony of respondent's youngest son, an expression from Rompilla's 14-year-old son that he loved his father and would visit him in prison. *Rompilla v. Beard*, ___ U.S. at ___, 125 S.Ct. at 2460-61. *See Marshall v. Hendricks*, 313 F.Supp.2d 423, 456 (D.N.J. 2004) ("we find it hard to imagine that testimony from, at the very least, Marshall's sons and siblings, would not have affected the jury."). 109a. The mitigation which defense counsel failed to discover starkly contrasts with, indeed, "bears no relation to the few naked pleas for mercy actually put before the jury." *Id.*, at ___, 125 S.Ct. at 2469. The undiscovered mitigation evidence in *Rompilla* was precisely the sort relating to that defendant's moral culpability which is utterly lacking in respondent's case.

The ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), to which this Court often refers for guidance, confirm the powerful persuasiveness of these types of mitigation evidence as compared to the insipid nature of respondent's

case. The mitigation on which respondent most relies would fall under the category of "family and social history." The parenthetical to that category in the ABA Guidelines reads as follows:

> [family and social history includes] physical, sexual or emotional abuse; family history of mental illness, cognitive impairment, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (*e.g.*, failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities)[.]

In discussing the need to locate and interview mitigation witnesses, the *Guidelines* emphasize:

> It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records -- from courts, government agencies, the military, evidencing, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a

> particular impairment. The collection of corroborating information from multiple sources -- a time-consuming task -- is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

The overwhelming emphasis is on the finding of what this Court considers to be persuasive mitigation, and which is entirely absent here -- evidence which diminishes moral culpability and explains criminal behavior. This is not to say that "humanizing" evidence is not mitigating evidence, but it is not particularly persuasive when it does not directly combat the evidence in aggravation. Here, that evidence is that respondent paid a man from Louisiana to kill his wife in order to collect over a million in insurance money and to be with his girlfriend.

The Third Circuit's decision in this case is also in contravention of this Court's recognition of the danger of mitigating evidence containing a "double edge," serving to aggravate as much if not more than mitigate. See *Wiggins*, 539 U.S. at 535. The Third Circuit failed to recognize that each laudatory comment mitigation witnesses might make regarding respondent would only serve to emphasize how heinous his crime was. A great many of respondent's mitigation witnesses referred to respondent as a "family man," "devoted" to his family, and even a "loving husband." Such testimony merely would have highlighted the obvious to a capital jury -- respondent destroyed his family by hiring the killer of his wife, and did it for sex and money. This is especially true with respect to potential testimony from respondent's family.

Finally, while an evidentiary hearing on the mitigating evidence was held in the district court, the evidence presented therein differed little from the documentary evidence presented to the New Jersey Supreme Court on post-conviction review. Hence, the habeas review standard in 28

U.S.C. § 2254(d)(1) remains relevant. Given that the decision of the Third Circuit conflicts with this Court's jurisprudence on the analysis of prejudice in an ineffective assistance of counsel case, it can scarcely be said that the state court decision that defendant was not prejudiced was "objectively unreasonable." See *Wiggins*, 539 U.S. at 520. For these reasons, this Court should grant certiorari.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully urges that this petition for writ of *certiorari* be granted.

Respectfully submitted,

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Dated: January 26, 2006

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-9007

ROBERT O. MARSHALL

v.

RON CATHEL*,
Administrator, New Jersey State Prison;
PETER C. HARVEY*,
Attorney General, State of New Jersey,
Appellants

*Pursuant to Rule 43(c), F.R.A.P.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 97-cv-05618)
District Judge: Honorable Joseph E. Irenas

Argued May 13, 2005

Before: ROTH, RENDELL and BECKER, Circuit Judges

(Filed November 2, 2005)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

On May 5, 1986, Robert O. Marshall ("Marshall" or "Petitioner") was convicted in New Jersey state court of conspiring to murder and procuring the commission of the murder of his wife, Maria Marshall. Almost twenty years after being sentenced to death for these offenses, Marshall petitioned for and was granted habeas corpus relief by the United States District Court for the District of New Jersey, after we remanded the case for an evidentiary hearing on Marshall's claim that counsel was ineffective during the penalty phase of his capital trial. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254; our appellate jurisdiction arises under 28 U.S.C. §§ 1291 and 2253. Before us is Respondents' appeal challenging the

District Court's determination regarding counsel's ineffectiveness and Marshall's entitlement to relief. For the reasons set forth below, we will affirm the District Court's order granting Marshall's habeas petition, vacating his death sentence, :and remanding to the state court for a new sentencing hearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

As chronicled in no less than six published opinions, the procedural history of this capital conviction is extensive.[1]

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[1] *See State v. Marshall,* 123 N.J. 1, 586 A.2d 85 (1991) *("Marshall I')* (affirming sentence of death on direct appeal); *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059 (1992) *("Marshall 11")* (denying Marshall's claim that a sentence of death was not proportional to his crime of conviction); *State v. Marshall,* 148 N.J. 89, 690 A.2d 1 (1997) *("Marshall III")* (affirming denial of Marshall's petition for post-conviction relief); *Marshall v. Hendricks,* 103 F. Supp. 2d 749 (D. N.J. 2000) *("Marshall IV")* (denying Marshall's application for writ of habeas corpus on all grounds); *Marshall v. Hendricks, 307* F.3d 36 (3d Cir. 2002) *("Marshall V")* (affirming district court's denial of habeas relief as to the guilt phase of Marshall's trial and remanding for further evidentiary development as to ineffectiveness of counsel in the penalty phase); and, *Marshall v. Hendricks,* 313 F. Supp. 2d 423 (D. N.J. 2004) *("Marshall* VI") (granting Marshall's petition for relief based on ineffectiveness of counsel in the penalty phase).

Throughout the course of this action, these opinions sometimes have been referred to as *"Marshall I ," "Marshall*

(continued...)

Because the issue before us is relatively narrow - as compared to the universe of claims lodged over the years by Marshall in his numerous appeals and petitions for post-conviction relief we will instead provide only the procedural history and facts relevant to the instant issue concerning counsel's effectiveness at the penalty phase of trial.

Maria Marshall was murdered on September 6, 1984. The investigation into her death soon led police to Louisiana, more specifically, to three men, all of whom were somehow connected to Robert Marshall - Robert Cumber, Billy Wayne McKinnon, and James "Jimmy" Davis. Evidence ultimately was presented at trial establishing that Cumber had met Marshall at a New Jersey party in May of 1984 and referred him to McKinnon, a former sheriff's officer, whom Marshall would pay to carry out the murder of his wife.[2] At trial, McKinnon testified that he was hired by Marshall to kill Maria but that another man unknown to Marshall, Larry Thompson, had actually pulled the trigger, killing Maria Marshall at a rest stop on the Garden State Parkway as she and her husband were returning from an evening at an Atlantic City casino. On September 21, 1984, investigators visited Robert Marshall in his home and questioned him for the first time about his knowledge of, and relationship with, McKinnon and Davis. The following day, Marshall contacted attorney Glenn Zeitz, and the two had an initial meeting in

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[1](...continued)
II," "Marshall III," Marshall IV," Marshall V," and *"Marshall VI."* For purposes of clarity, we will preserve those designations herein.

[2]McKinnon used the alias James (or Jimmy) Davis when dealing with Marshall. This same name was used on money transfers from Marshall, although McKinnon enlisted someone actually named James Davis to sign for the money.

Zeitz's office on September 25, 1984. Within days of retaining Zeitz, Marshall checked himself into a hotel where, once alone in his room, he telephoned each of his sons - Robert, Chris, and John - and prepared five audio tapes: one for each son; one for his brother-in-law and family attorney, Joseph Dougherty; and lastly, one for his secretary. The calls and tapes were suicide notes of sorts - after placing the calls and recording the tapes, still in his hotel room, Marshall mixed a large quantity of prescription sleeping pills into a soda, which he later claimed that he had intended to drink. He fell asleep before doing so.

The tapes to his secretary and his sons did not contain any incriminating statements as such. However, the Dougherty tape discussed Marshall's relationship with a paramour, including his plans to leave Maria, his escalating debt that had spiraled to almost $200,000, and his concerns that the police suspected his involvement in Maria's murder because he had hired McKinnon to find five or six thousand dollars that was missing.

The trial against Marshall and co-defendant Thompson began on January 27, 1986.[3] As part of its case in chief, the

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[3]Co-defendant Robert Cumber, charged with conspiracy to murder Maria Marshall and with purposely or knowingly causing the death of Maria Marshall as an accomplice, was tried separately, convicted on both counts, and sentenced to thirty-years imprisonment without eligibility for parole. *Marshall I,* 123 N.J. at 3-4. Co-defendant McKinnon, indicted for the same offenses as Cumber, secured an extremely favorable plea bargain - pleading guilty only to conspiracy to commit murder, offering up Thompson as the person who actually shot Maria Marshall, and agreeing to testify against Marshall. He was sentenced to five-years

(continued...)

prosecution played for the jury the "suicide" tape Marshall had recorded at the hotel for Dougherty.[4] In presenting Marshall's defense, Zeitz also introduced certain of the tapes - those made for his three sons,[5] on which Marshall apologized for leaving them, expressed his love for the boys, and encouraged them to pursue successful lives.[6] Zeitz also introduced evidence concerning Marshall's civic and charitable activities, and produced four character witnesses who testified to Marshall's general reputation for honesty and integrity. In addition, Marshall took the stand in his own defense.

Closing arguments were held on March 3, 1986. The court instructed the jury on March 4th, and the jury returned with its verdict late in the morning of March 5th, convicting

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[3](...continued)
imprisonment and provided assistance with entry into the witness protection program. *Marshall V*, 307 F.3d at 46.

[4]Zeitz had unsuccessfully moved to suppress the tapes.

[5]The tapes were admitted into evidence over the objection of the prosecution.

[6]The tapes made for the boys were introduced during Robert Marshall's testimony. Each of Marshall's sons, however, also were called to testify - not only about the content of the audio tapes, but about the phone calls their father had placed to them from the hotel around the same time as the recordings were made. John confirmed that when Marshall telephoned them on September 27, he had sounded "upset and depressed." *Marshall I*, 123 N.J. at 54. Robbie testified that his father had sounded "shaky." And Chris, Marshall's middle son, testified that Marshall sounded as though he was saying goodbye.

Marshall of murder and conspiracy to commit murder.[7] Immediately thereafter, Marshall's family members, including his youngest son John, his sister Oakleigh De Carlo, and his brother Paul, left the courthouse to return to their home in Toms River, New Jersey, located roughly forty-five minutes away, apparently with no knowledge that the penalty phase was imminent.

While being escorted from the courtroom after the verdict was read, Marshall fainted. An ambulance took Marshall to the hospital where he was examined at 12:30 p.m., then discharged approximately 50 minutes later. He was back in the courtroom approximately 15-20 minutes later.

During Marshall's absence, Zeitz conferred with the prosecution concerning the penalty phase, and they reached an agreement as to how they would proceed. Of the three aggravating factors charged by the prosecution - (1) that the "defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value," N.J. Stat. Ann. § 2C:11-3(c)(4)(c); (2) murder for pecuniary gain, N.J. Stat. Ann. § 2C:11-3(c)(4)(d); and (3) the heinous nature of the offense, N.J. Stat. Ann. § 2C:11-3(c)(4)(e)-the State agreed to argue only the first of those factors, based on its case that Marshall had hired someone to kill his wife. The prosecution further agreed to stipulate to a single mitigating factor, that Marshall had no prior criminal record, N.J. Stat. Ann. 2C:11-3(c)(5)(f). Defense counsel would retain the right to argue the second of its two filed mitigating factors - the "catch-all" factor set forth in N.J. Stat. Ann. § 2C:11-3(c)(5)(h), which provides that the jury may consider "any other factor which is relevant to the

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[7]Marshall's co-defendant, Larry Thompson, the alleged "shooter," presented alibi evidence at trial resulting in his acquittal. No one was, or since has been, convicted of actually shooting Maria Marshall.

defendant's character or record or to the circumstances of the offense" - but both the prosecution and the defense would waive openings and limit themselves to a single short closing statement to the jury.

Upon Marshall's return from the hospital, Zeitz briefly conferred with his client. The penalty phase convened shortly thereafter at 1:45 p.m. that same day. Outside the presence of the jury but on the record, the parties explained their agreement to the judge, who allowed them to go forward as agreed and summarized as follows:

> COURT: As I understand it, what will now occur is that I will now make the usual opening statement to the jury that is made in this proceeding. I believe that the law now is I know that the law now is, expressly, that any evidence: which was introduced in the trial can be considered as evidence for purposes of this proceeding. Given that, I understand that neither counsel intend[s] to introduce any further evidence in this proceeding.
>
> KELLY: That's correct, Judge.
>
> ZEITZ: That's correct, Judge. I would like, at least, to have the record reflect that I've had an opportunity to speak with my client, and discuss his right, if he desired, to call any witnesses with regard to the penalty phase of the proceedings, and it's his desire, and it is also my feeling, that we do not need to call any witnesses at this stage of the proceedings. And we've had, I believe, an opportunity to discuss this, and this is his intention.

Marshall VI, 313 F. Supp. 2d at 435. Per the agreement, Zeitz was first to address the jury; he offered the following statement, repeated here in its entirety:

ZEITZ: Yes. Thank you, your Honor. It would be an understatement for me to say that this is not a difficult moment for me, and I'm sure it's difficult for everyone in terms of the proceedings that we now have to deal with.

What, in essence, we are at right now at this stage is a situation where the State has agreed that there is one mitigating factor which you must find exists in the case, and that that [sic] Rob Marshall has never had any type of criminal record of any kind.

The reason why I believe, when you look to the legislative history of the death penalty when it came into New Jersey that that clearly is a mitigating factor, is because, if you will, people feel, and I think quite rightly, that if you live a law-abiding life, that at some point in time you may be in a position where you may have to ask people to allow you to draw, if you will, maybe a credit because of the fact that you've led such a life. There are people obviously who have not led law-abiding lives and have been in situations where they've been in front of a jury and the jury has convicted them of a capital offense, and the jury will hear that this person has led a life, not law-abiding, but in fact, has had a juvenile record, has had a record of other offenses and, for the most part, has lived a life that in all ways, shapes, and forms never conformed to what our society at least requires.

In this particular case it's been agreed that Rob Marshall has led a law-abiding life, and that you must consider that as a mitigating factor.

The State has one aggravating factor which they are going to ask you to consider, and that is the fact, under the statute, this offense as you have found -

and at this point, as a lawyer, I have to accept that you have found that - was procured by the payment or the thought of payment for some pecuniary gain.

The other mitigating factor that Judge Greenberg referred to deals with other circumstances and factors which a jury may consider in mitigation with regard to the death penalty. In this particular case, in addition to the fact that Rob Marshall has no prior criminal record, there's certain things, at least with regard to his life, that he has done, which he is entitled for you to consider.

He was involved in, among other things, with the Ocean County Businessmen's Association. You've heard that. He was campaign chairman for United Way, and for a number of years worked with them in community affairs, raising money for United Way. In addition to that, he served with his family on various social activities, involving the swim leagues and certain other things of a community nature.

I don't want to stand here and go through the whole litany of things that he's done in forty-six years that -either for other people or for his family or of a civic nature. Suffice it to say, the record is substantial in that area, and you have an absolute right to consider that as a mitigating factor.

As the Judge told you, now, in terms of a defense, we do not have to prove to you that the mitigating factors in some way outweigh the aggravating factor. The State has to prove to you, beyond a reasonablbe [sic] doubt, and you certainly know what that standard is, because you've been told that and you've been explained that by counsel, you have to use that standard when you determine whether or not

you feel he deserves the death penalty.

One thing I have to tell you about this, which I think makes it an individual decision for each one of you, and that is that the only way that the death penalty can be imposed is if all twelve of you agree to do it unanimously. So that you, in essence, have a power in your hands that, quite candidly, I would never have in my hands, because, as a lawyer, we generally don't serve as jurors. So I have no way of knowing what it must be like.

All I can say is this, that I hope when you individually consider the death penalty, that you're each able to reach whatever opinion you find in your own heart, and that whatever you feel is the just thing to do, we can live with it.

Id. at 433-34. No documentary evidence or witnesses were presented, nor did Zeitz plead for the jury to spare his client's life. Marshall chose not to make a statement on his own behalf. After only ninety minutes of deliberation, the jury sentenced Marshall to die by lethal injection. The jury unanimously found beyond a reasonable doubt the existence of the aggravating factor, and also found evidence of the existence of both mitigating factors. However, it concluded unanimously beyond a reasonable doubt that the aggravating factor outweighed the mitigating factors.

As noted above, the proceedings have been the subject of extensive judicial review. Relevant here is Marshall's claim that Zeitz rendered ineffective assistance of counsel during the penalty phase of the trial as described above. This claim was rejected by the New Jersey Supreme Court in *Marshall I,* 123 N.J. at 166 ("We are unwilling to second-guess counsel's strategic decision on this issue, particularly in view of the jury's determination that both mitigating factors offered had been established."), and then revisited and rejected for a

second time in *Marshall III,* 148 N.J. at 254 ("[T]he contention that proper investigation and preparation would have unearthed new mitigating evidence that probably would have affected substantially the penalty-phase deliberations is simply too speculative to warrant an evidentiary hearing.").

Initially, relying on the state court record, and without holding an evidentiary hearing, the District Court also denied this claim of ineffectiveness. *See Marshall IV.* Marshall appealed to this Court, leveling the following claims of ineffectiveness at the penalty phase: 1) The penalty phase should not have commenced immediately upon Marshall's return from the hospital; 2) Zeitz presented no mitigation evidence (even though the judge instructed the jury to decide the existence of mitigating factors based on the evidence); 3) Zeitz failed to offer evidence to humanize Marshall, such as describing his childhood, his commitment to family, and his extensive community service; 4) Zeitz's statement to the jury was extremely brief and contained no request for mercy; 5) Zeitz never discussed the penalty phase with Marshall; and, 6) Zeitz never prepared for the penalty phase and conducted no investigation. We grouped these claims into two overarching categories: (1) lack of consultation, preparation, and investigation by counsel, and (2) lack of content or substance in counsel's representation at the penalty phase: In terms of analyzing these claims, however, we lacked a sufficient record to rule. "The difficulty we encounter here is that the picture is less than complete. We cannot, and the courts before us did not, evaluate Zeitz's decisions in light of his stated strategy." *Marshall V,* 307 F.3d at 106. "[T]here is no record before us as to what preparation or investigation, if any, was performed by counsel in anticipation of the penalty phase, nor is there any record of why counsel chose not to undertake investigation that we know he did not - *e.g.*, why he chose not even to contact many of Marshall's proffered mitigation witnesses." *Id.* We explained that, while we knew certain pieces of information, such as that Zeitz's usual practice was to take and date notes of conversations

with Marshall, Zeitz's sparse testimony on these issues had been offered in response to unrelated questions at an evidentiary hearing held for a purpose other than to discern his effectiveness.[8]

> Because the only testimony from Zeitz was restricted to the two areas discussed above, we have no evidence from Zeitz himself regarding the scope or strategy of his preparation or investigation, or the choices he made in conducting the penalty phase as he did.
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> To this date we have no information from counsel, or anyone else for that matter, that addresses the issues Marshall raises and from which we could make an informed assessment as to the reasonableness of counsel's actions - and, even more important - as to what counsel's decisions actually were at the time.

Id. at 108. Accordingly, we remanded the case to the District Court in order that an evidentiary hearing be held regarding these issues. The District Court held such a hearing and heard final oral arguments from the parties, after which it concluded that Zeitz's penalty phase representation had been

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[8]When Marshall petitioned for state post-conviction relief, he requested a "complete evidentiary hearing to support the claims raised in the petition through the presentation of testimonial and documentary evidence." *Marshall II,* 690 A.2d at 26. However, the Court granted a full evidentiary hearing as to only five of Marshall's claims, all of which related to defense counsel's promising, as part of his opening statement, that Marshall would take the stand, and to whether Marshall was competent to participate in the penalty phase, given his collapse following the verdict.

constitutionally ineffective, granting Marshall a writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254.

II. THE EVIDENTIARY HEARING

Pursuant to our remand order in *Marshall V*, the District Court conducted an evidentiary hearing over the course of September 2003, during which Zeitz testified at length concerning his representation of Marshall. The testimony elicited at the hearing bears directly upon the questions that formed the basis for our remand, namely, what did Zeitz do to prepare for the penalty phase, and why did he conduct himself as he did during the penalty phase. Zeitz's hearing testimony, by itself, provides the answer to our inquiries - Zeitz did nothing in preparation, leaving him with no options during the penalty phase.

At the outset of his representation of Marshall, in 1984, Zeitz had defended clients who faced the death penalty. His testimony at the evidentiary hearing establishes that, based on his experience, he thought it probable, if not certain, that the State's case against Marshall would indeed implicate the death penalty:

> RESPONDENTS' COUNSEL: Mr. Zeitz . . . when you commenced representing Robert Marshall, were you mindful of the fact that there would be potentially, a penalty phase or mitigation phase of this case?
>
> ZEITZ: Yes.
>
> RESPONDENTS' COUNSEL: And what sensitized you to that realization that there could be a penalty phase of Marshall's case?
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> ZEITZ: Well, obviously it was a death penalty case,

> and obviously I knew if he was convicted in the guilt phase I'd be confronted with a penalty phase.
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> RESPONDENTS' COUNSEL: Did you know that from the first time you became involved with the Marshall case, sir?
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> ZEITZ: I - the only way I can answer is as follows. When I first met him and interviewed him initially, and he told me what his version was of certain events, and answered certain specific questions that I had, I knew that at least in the first interview that this case clearly had the capacity of becoming a death case.

(Test. of Glenn Zeitz at A266.) Not only might it be a death penalty case, it was fast becoming a difficult case. Zeitz testified that he had, at that first meeting with Marshall, admonished Marshall "to keep his mouth shut" about his role in the ongoing investigation. (*Id.*) Notwithstanding this warning, as described above, within a few days Marshall checked himself into a hotel room, with the apparent plan of killing himself, where he made a series of recordings for important people in his life, including his brother-in-law, Joseph Dougherty. According to Zeitz, the Dougherty tape was nothing short of "devastating": "[I]t was my client in his own words making statements that later became consistent with, and almost in some ways, the foundation of . . . the State's case against him." (*Id.* at A333.)

Facing such "devastating" evidence of his client's guilt, Zeitz testified that his focus became portraying Marshall to the jury as a likeable man:

> ZEITZ: So the hope was that I could - in his direct I would humanize him, I could show him to the jury as being someone that loved his children, and create this image ... the perception, if you will, that he and

> the three sons still had, if you will, a close relationship, and he cared about them.
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> ***
>
> And Mr. Marshall and I talked about it, because it was our opinion and our strategic decision that we had to figure out a way to rebut and confront the tape that he created for his brother-in-law. [It] also gave us a mechanism in the guilt phase of the case to accomplish what he wanted to accomplish. I wanted to have a denial defense, maintain his innocence, be able to demonstrate to the jury that he was a human being, loved his kids and they loved him.

(Test. of Glenn Zeitz at A336, A338.) Zeitz testified that, at the close of evidence in the guilt phase of the trial, he was satisfied with the extent and nature of the humanizing evidence he had introduced on Marshall's behalf.

Although Zeitz had, in the time leading up to the commencement of the trial, hired an investigator named Russell Kolins to assist in gathering information relevant to Marshall's case, including the humanizing evidence referenced above, Zeitz testified that at no time did either he or Kolins engage in pointed discussions with individual family members, friends, neighbors, or business associates to determine: (1) if any of those individuals would be willing to testify at a penalty phase *should Marshall be found guilty;* or (2) what those persons might say if called to testify.[9] Despite

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[9]As noted by the District Court, at the evidentiary hearing Kolins testified that he had such conversations, "however, he has no notes of such conversations, he cannot identify names of the persons with which he spoke, nor can he identify the content of these discussions." *Marshall VI,* 313 F. Supp. 2d

(continued...)

almost constant contact and communication with immediate members of Marshall's family, including his sons and sister, even these critical potential witnesses were never once interviewed or asked to testify in contemplation of the penalty phase. Kolins was the sole professional resource engaged by Zeitz to assist in gathering evidence of the sort that might serve as mitigating - Zeitz did not retain a mitigation specialist, social worker, or mental health expert[10] to evaluate Marshall, to interview potential witnesses, to investigate his

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[9](...continued)
at 432 n.9. "Zeitz's files do not contain these notes either, even though Kolins claims to have turned over his notes to Zeitz." *Id.*

[10]Again, as noted by the District Court, Marshall did undergo a psychological evaluation prior to the start of trial, following his suicide attempt. *Marshall VI,* 313 F. Supp. 2d at 432 n.10. When Zeitz was notified about the incident and informed that Marshall had been admitted to Point Pleasant Hospital, Zeitz contacted Dr. Elliot Atkins and arranged for him to talk to Marshall. Shortly thereafter, Marshall was transferred to the Institute of Pennsylvania Hospital, a psychiatric facility, where he was treated by Dr. David Walzer. Although Zeitz recognized that "what the dynamics are in someone's mind . . . could affect a substantive defense, or how you handle a mitigation aspect of a case," he conceded that he never asked Dr. Atkins or Dr. Walzer for a report or diagnosis of Marshall's mental state, nor was he aware if a diagnosis was ever made. Zeitz testified that "he wanted to put a lid on" what he learned anecdotally from Dr. Walzer - that Marshall was narcissistic and manipulative, that he was behaving in a sexually provocative way with staff members and seemed to exhibit no remorse over the death of his wife. (Test. of Glenn Zeitz at A293.)

school or medical records, or to conduct an investigation into the existence of any potentially mitigating information.

Therefore, when the jury rendered its verdict of guilty, Zeitz had nothing additional to put forth in the penalty phase and he knew it:

> RESPONDENTS' COUNSEL: [Y]ou've now got your client convicted, had you prepared some additional list of mitigating factors to have available to you in the event that the jury convicted your client?
>
> ZEITZ: Are you talking about did I have a working list - not statutory, non-statutory mitigating factors? The answer to that question is no.
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> ***
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> RESPONDENTS' COUNSEL: You knew that the defense attorney's discovery obligation in a capital case, with respect to evidence used in mitigation in the penalty phase, kicks in at the moment the defendant is convicted of capital murder?
>
> ZEITZ: You don't have to give it to them before ...
>
> RESPONDENTS' COUNSEL: Exactly.
>
> ZEITZ: Of course.
>
> RESPONDENTS' COUNSEL: So, my question was then he was convicted on March 5th, 1986, did you have any documents, discovery of any kind, that you were considering to turn over as part of what you were going to present in the penalty phase?
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> ZEITZ: No.

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> RESPONDENTS' COUNSEL: [D]id you have any other witnesses lined up as potential mitigation witnesses for the penalty phase, prior to reaching this agreement about not calling witnesses?
>
> ZEITZ: No.

(Test. of Glenn Zeitz at A144-146.) This "agreement," whereby the prosecution stipulated to a single aggravating and single mitigating factor, and both parties consented to waive openings and limit themselves to a single short closing statement to the jury, was arrived at within an hour or so of the guilty verdict. Essentially, as Zeitz testified before the District Court, "There wasn't going to be any evidence produced by either side in the penalty phase of the case." (*Id.* at A 100.)

As recounted by the prosecutor in the case, Kevin Kelly, whom Zeitz approached after the guilty verdict to discuss the penalty phase: Zeitz "asked me if I was going to produce any evidence [in the penalty phase.] I said, well, that's going to be up to you in terms of what you're going to do. And he said, well, I've already, in terms of mitigating factors, I've already presented everything during the course of my case in chief and during the trial and there is really nothing I can add to it." (Test. of Kevin Kelly at A633.) Kelly continued, "Mr. Zeitz felt, and he expressed to the Judge in chambers, that he had presented everything about Marshall's character, his reputation in the community, his standing in the community, his relationship with his family, a good father, so forth and so on, it's already been said and done during the case, and he said to the effect 'I have nothing else to add to that.'" (Id. at A640.) While Zeitz testified that his and Marshall's overall strategy for the trial contemplated being able to "take the position that the jury could incorporate into the penalty phase whatever they heard in the guilt phase of the case," (Test. of

Glenn Zeitz at A341) he conceded that, during closing, he never stated so explicitly or alluded to the Marshall boys' guilt phase testimony. Zeitz had thought the sons' testimony during the trial was powerful: "[T]he impact in the courtroom was there." (Test. of Glenn Zeitz at A341.) Clearly, Zeitz misjudged the effect of the testimony as a weapon against conviction, as the jury deliberated for only ninety minutes before returning with a guilty verdict. Its use as a weapon later in a plea for life remains untested.

Zeitz recalled having had two conversations with Marshall following the verdict regarding how to proceed in the penalty phase. These conversations were, of course, after Marshall had fainted, been examined at the hospital and returned to the courtroom. The first conversation focused on the agreement Zeitz had struck with the prosecution and whether Marshall's sons should testify in the penalty phase. Marshall stated that he did not want his sons to testify and that he approved the agreement. The second conversation confirmed with Marshall that, after discussing the proposed course of action with the judge, counsel would proceed per the agreement. Zeitz also testified that he informed Marshall that they could ask the judge for a postponement if that was what Marshall wanted: "And if I thought at that point in time that that was what we should do, and if he said to me that's what he would have wanted, we would have done that. But that wasn't what we wanted to do." (Test. of Glenn Zeitz at A106.)

III. RELEVANT STANDARDS

In analyzing the merits of a habeas petitioner's claims, considerations under the AEDPA are divided; a federal court considers separately the state court's legal analysis and factual determinations. *See* 28 U.S.C. § 2254(d)(1)-(2). When according deference under the AEDPA, federal courts are to review a state court's determinations on the merits only to ascertain whether the state court had reached a decision that

was "contrary to" or an "unreasonable application" of clearly established Supreme Court law, or if a decision was based on an "unreasonable determination" of the facts. *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (section 2254(d)(1) is a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law). To label a state court decision "contrary to" Supreme Court precedent, the state court must have reached a "conclusion opposite to that reached by the [Supreme] Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413.

An "unreasonable application" results where "the state court identifies the correct governing legal principle from the [Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "In other words, a federal court may grant relief when a state court has misapplied a `governing legal principle' to `a set of facts different from those of the case in which the principle was announced.'" *Wiggins v. Smith,* 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 155 L. Ed.2d 144, 123 S. Ct. 1166 (2003) (other citations omitted)). In order for a reviewing federal court to find a state court's application of Supreme Court precedent "unreasonable," the state court decision must be "more than incorrect or erroneous"; it must have been "objectively unreasonable." *Id.* at 520 (citations omitted).

Here, the relevant "clearly established Supreme Court law" or "governing legal principle" concerning ineffective assistance of counsel is that honed by *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and its progeny, under which a petitioner must demonstrate counsel's performance was deficient, that is, it "fell below an objective standard of reasonableness." 466 U.S. at 688. As explained by the Court in *Strickland:*

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689. Where an attorney's actions are the result of "strategic choices" this presumption of reasonableness is even stronger. If the strategic choice is "made after thorough investigation of the law and facts relevant to plausible options," the Supreme Court has held that the presumption of reasonableness is essentially irrebuttable. *Id.* at 690. Even if an attorney's strategic choice is made "after less than complete investigation," those choices are still considered "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 690-91. An attorney's duty to investigate is itself judged under a reasonableness standard based on "prevailing professional norms" such as those found in the ABA Standards for Criminal Justice. *See Wiggins,* 539 U.S. at 522-23.

Under *Strickland,* a petitioner also must demonstrate that he was prejudiced by the deficient performance. 466 U.S. at 688. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." *Id.* at 687. To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Therefore, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

IV. THE DISTRICT COURT OPINION

In its comprehensive and incisive opinion, the District Court addressed several aspects of Zeitz's penalty phase assistance and, following the lead of this Court, *see Marshall V*, 307 F.3d at 98-99, grouped six individual allegations of deficient performance into two overarching categories:

> **(1) Lack of consultation, preparation, and investigation by counsel ("pre-penalty"):**
>
> 1. Zeitz failed to prepare for or investigate a case for life;
>
> 2. Zeitz failed to discuss the penalty phase with Marshall; and
>
> 3. Zeitz failed to request an adjournment and permitted the penalty phase to commence immediately after Marshall's return from the hospital.
>
> **(2) Lack of content or substance in counsel's representation at the penalty phase:**
>
> 1. Zeitz failed to present mitigating evidence during the penalty phase;

2. Zeitz failed to humanize Marshall; and

3. Zeitz failed to make a plea for his client's life.

Marshall VI, 313 F. Supp. 2d at 441. The District Court concluded that, although the state court had identified the correct legal principles governing Marshall's claims of ineffectiveness, namely *Strickland,* and thus its decision to deny Marshall relief was not "contrary to" established Supreme Court precedent, the state court's application of that precedent so as to find that Zeitz's representation had been effective was "objectively unreasonable." *Marshall VI,* 313 F. Supp. 2d at 455. Therefore, the District Court concluded, Marshall was entitled to relief under the AEDPA.

With respect to the adequacy of investigation, preparation and consultation, the District Court found that neither Marshall's obstreperousness as a client, nor Zeitz's protestations that he had gathered sufficient mitigation evidence even though not as part of a penalty phase investigation, rendered Zeitz effective or his conduct reasonable. *Id.* at 452-53. The Court concluded that, "at a bare minimum, Zeitz was required to have specific discussions with Marshall and his family members about the possibility of a penalty phase, what a penalty phase entails and a discussion with each person individually as to whether he or she would have been willing to testify and what he or she would have said." *Id.* To this end, in its opinion, the District Court painstakingly detailed the "apparent plethora of potentially useful mitigation witnesses available to the defense at the time of the trial," *id.* at 444, discussing the substance of what more than fifteen witnesses had testified they would have said about Marshall had they been asked to take the stand on his behalf during the 1986 penalty phase. The list of would-be mitigation witnesses includes family members, childhood friends, neighbors and business associates. *Id.* at 444-45 n.2944. "Here, Zeitz's representation fell below the professional standard because he failed to conduct any

investigation into possible mitigating factors and provides no objectively reasonable justification for failing to do so." *Marshall VI*, 313 F. Supp. 2d at 444 (citing, e.g., *Dobbs v. Turpin*, 142 F.3d 1383, 1387 (11 th Cir. 1998) (affirming the district court's finding that defense counsel's representation was ineffective where counsel had failed to conduct a reasonable investigation of defendant's background and produced no mitigating evidence at the penalty phase) (other citations omitted)). Moreover, in light of this utter lack of preparation, the District Court found Zeitz's decision not to ask the trial court for a continuance before commencement of the penalty phase even more incredible:

> We are convinced that no reasonable attorney in Zeitz's position would have gone forward without an adjournment. Zeitz did not have a single witness ready to testify, nor was he aware of any useful mitigating evidence aside from a cursory understanding of Marshall's charitable work and the fact that he had no prior criminal record. Zeitz's decision to move forward also ensured that Marshall's family would not be present during the proceedings because Marshall's sister Oakleigh had taken John and other family members home earlier in the day, mistakenly believing that the penalty phase would not start that afternoon.

Id. at 449-50 (internal footnote omitted).[11]

As to those claims relating to the substance, or lack

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[11]One aspect of Zeitz's pre-penalty performance the District Court found not to have fallen below constitutional standards was the failure to obtain records or documentary evidence of Marshall's charitable activities. On this point, the District Court concluded, "we are satisfied that Zeitz acted reasonably." *Marshall VI*, 313 F.Supp.2d at 448.

thereof, of Zeitz's penalty phase presentation, the District Court properly noted as a threshold matter that its analysis was colored by Zeitz's failings up to that time: "Because Zeitz did not engage in a reasonable investigation prior to the penalty phase, his subsequent decisions do not enjoy the same deference as decisions made after proper investigation and preparation." *Marshall VI,* 313 F. Supp. 2d at 453 (citing *Strickland,* 466 U.S. at 690-91, and *Wiggins,* 123 S. Ct. at 2535-39). Again, the District Court found that Zeitz's representation had been substandard and that Marshall was prejudiced by the inadequate performance, arid had thus violated *Strickland's* dictates. The District Court correctly noted that "no absolute duty exists to introduce mitigating or character evidence," *Chandler v. United States,* 218 F.3d 1305, 1319 (11th Cir. 2000), but concluded that:

> [t]his is not a case where, after reasonable investigation, Zeitz determined that it was tactically a better choice not to put on a mitigation case. Rather, it is a situation where Zeitz inadequately prepared for the penalty phase and put on no mitigating evidence because he had none to present. Zeitz only provided the jury with a stipulation that Marshall had no prior criminal record and an embarrassingly superficial mention of Marshall's charity work. Therefore, Zeitz's decision was not a reasonable strategic choice, but an abdication of his constitutional duty. Nothing in the record provides a reasonable professional justification to support a decision not to present a case for life.

Id. at 453-54. Consonantly, the District Court noted, there exists no *per se* rule requiring counsel to plead for his client's life, *Bell v. Cone,* 535 U.S. 685, 701, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), but, "given the complete lack of investigation prior to the penalty phase and Zeitz's limited and cursory closing statement, Zeitz's decision not to ask the jury to spare his client's life seems incomprehensible."

Marshall VI, 313 F. Supp. 2d at 454. Having described in detail all aspects of Zeitz's challenged penalty phase representation, the District Court succinctly summarized, stating that it had "no confidence that the penalty phase of Marshall's trial was a genuine adversarial proceeding, the assurance of which is at the very heart of the right to counsel under the Sixth Amendment." *Id.* at 457.

IV. DISCUSSION[12]

Like the District Court, we have little confidence that Marshall was afforded the guarantees to which he is entitled under the Sixth Amendment and, therefore, we concur with its findings and legal conclusions. As the District Court detailed, the several categories of Zeitz's failures correspond closely with familiar principles of substandard attorney conduct often alleged in connection with penalty phases or capital cases. Before us we have, at the same time, and intersecting often, claims of failure to investigate, failure to present mitigating evidence, failure to make a plea for life, and failure to humanize (and recognize the distinct nature of the penalty phase separate and apart from the guilt phase).

Much has been written, and opined, about each of these separate types of claims, and the bounds of attorneys' duties with respect thereto. Very often claims of inadequate investigation and failure to present mitigating evidence involve the existence of actual facts that were either known or unknown, or were later discovered, that may well have altered the jury's view of the balance struck between aggravating and mitigating evidence. *See, e.g., Rompilla v. Beard,* ___ U.S. ___ 125 S. Ct. 2456, 2467, 162 L. Ed. 2d

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[12]Where the district court conducts an independent evidentiary hearing, we exercise plenary review over matters of law; we review the district court's findings of fact for clear error. *Whitney v. Horn,* 280 F.3d 240, 249 (3d Cir. 2002).

360 (2005) ("It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking."); *Wiggins,* 123 S. Ct. at 2542 ("[P]ostconviction interviews with Wiggins himself and with members of his family produced evidence of severe abuse."); *Jermyn v. Horn,* 266 F.3d 257, 306 (3d Cir. 2001) ("Counsel failed to investigate the circumstances surrounding Jermyn's childhood, even though counsel admitted at the PCRA hearing that he was aware that Jermyn had claimed that he was abused as a child."). However, we have, presented here, a very different case. We have significant failings in several specific areas coupled with the most elementary misstep of all - a total failure of Zeitz to prepare for the penalty phase of the trial.

Zeitz's testimony before the District Court at times seeks to explain this abdication, but when viewed in perspective, the lack of preparation is striking and inexplicable. Moreover, it clearly doomed Marshall:

- The testimony is crystal clear that up until the moment the verdict was announced, Zeitz had performed no preparation for the penalty phase, failing to interview witnesses, accumulate documentary evidence, or engage experts of any kind to aid in the development of mitigation material;

- Zeitz then proceeded not to request a continuance in order to investigate and perhaps develop such evidence but, instead, chose to strike an "agreement" whereby he simply agreed not to do
what he was already unable to do - mount a case for life.

- Despite testimony from Zeitz alluding to his

strategy of incorporating at the penalty phase the strong humanizing evidence from the guilt phase, at the penalty phase Zeitz merely made a brief statement, recalling only a few bits of evidence from the trial - superficial charitable and family events which seemed almost bizarre in retrospect - omitting reference to Marshall's sons, and making no plea for Marshall's life.

- The rationale for "choosing" this route range from weak to nonexistent. As the District Court concluded, and we noted above: "This is not a case where, after reasonable investigation, Zeitz determined that it was tactically a better choice not to put on a mitigation case. Rather, it is a situation where Zeitz inadequately prepared for the penalty phase and put on no mitigating evidence because he had none to present." *Marshall VI,* 313 F. Supp. 2d at 453.

As recounted above, from the time of his very first meeting with Marshall in September of 1984, Zeitz was aware, if not convinced, that Marshall's case would implicate the death penalty. "I knew that at least in the first interview that this case clearly had the capacity of becoming a death case." (Test. of Glenn Zeitz at A266.) By December of 1984, Marshall had been arrested and he was indicted early the following year. Zeitz testified that, following these developments, in a meeting with Marshall, he again alluded to the then-certain capital nature of the case facing his client:

ZEITZ: I went to see him in January when he was indicted and I delivered at that time the notice of aggravating factors to him, and I also delivered the notice of mitigating factors which I had filed, and I sat and talked with him in the jail and explained to

> him these are the aggravating factors, these are the mitigating factors, the state filed this, we filed this, and we had discussions then and thereafter with regard to what would happen if we got to the penalty phase.

(*Id.* at A 141.) Marshall, however, testified that he did not recall ever receiving anything referencing aggravating factors, nor did Zeitz discuss with him the procedures employed in a capital case should they face a conviction. "We didn't have any discussions about my being convicted." (Test. of Robert Marshall at A704.) Whether or not Zeitz discussed with Marshall what would happen should they find themselves confronted with a penalty phase, Marshall's trial did not begin for roughly one year after the indictment, and, all the while, no preparation pertaining exclusively to the penalty phase of trial was undertaken by Zeitz or his investigator Russell Kolins.[13] Zeitz testified both that, over the course of that year, Marshall became an increasingly difficult client to control (he had, from the start been a client who was adamant about charting his own defense), and the community, perhaps even his sons, had progressively turned against Marshall, disbelieving his protestations of innocence. But neither circumstance excuses counsel's failure to conduct any investigation into possible mitigating factors or prepare a case for life. *See United States v. Gray*, 878 F.2d 702 (3d Cir. 1989) ("[Defendant's] reluctance to subpoena witnesses . . . did not absolve [his counsel] of his independent professional responsibility to investigate what information . . . potential witnesses possessed."); *Dobbs*, 142 F.3d at 1388 (stating that

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[13]According to Zeitz, "[Kolins] knew based on our prior experience that his responsibilities included not only [going to Louisiana to gather information about McKinnon], but if he found something at any point in time that could relate to either part of the case, [guilt or penalty phase,] that was his job." (A278.)

lawyers may not "blindly follow" a client's commands without independently evaluating potential avenues and properly advising the client).

Although recognizing the fact that Marshall was tried almost twenty years ago, even then Zeitz well knew that "the unique nature of modern capital sentencing proceedings . . . derives from the fundamental principle that death is different." *Schiro v. Farley'* 510 U.S. 222, 238, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994) (citations omitted). Widely accepted national guidelines, state specific standards, and Zeitz's own testimony regarding his previous capital experience - all of which aid in our evaluation of the reasonableness of Zeitz's preparation -make clear that Zeitz understood but abdicated his responsibility as counsel to a client facing a possible death sentence.

First, in 1986, among the "prevailing professional norms" set forth in the ABA Standards for Criminal Justice, a source recommended as a useful guide by the Supreme Court in *Strickland,* 466 U.S. at 688-89, and, more recently, *Rompilla,* 125 S. Ct. at 2466 ("We long have referred to these ABA Standards as `guides to determining what is reasonable."') (quoting *Wiggins,* 539 U.S. at 524), was the following relevant Standard:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard for Criminal Justice, 4-4.1 (2d ed. 1982 Supp.). The District Court found that this ABA provision, "coupled with *Strickland's* explicit language requiring a thorough investigation into facts relevant to both guilt and sentencing clearly show that a separate penalty phase investigation was the very foundation of reasonable representation in 1986." 313 F. Supp. 2d at 441. We agree. As we opined in *Marshall V:*

> The existence of a penalty phase in capital trials makes such trials radically different from ordinary criminal trials. A full capital trial is in fact two separate but intimately related trials: a preliminary guilt trial focusing on issues pertaining to the commission of a capital offense, and a subsequent penalty trial about the convicted defendant's worthiness to live. The guilt trial establishes the elements of the capital crime. The penalty trial is a trial for life. It is a trial for life in the sense that the defendant's life is at stake, and it is a trial about life, because a central issue is the meaning and value of the defendant's life.

307 F.3d at 99 (quoting Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L. Rev. 299, 303 (1983)). "The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make the case for life. The purpose of the investigation is to find witnesses *to help humanize* the defendant, given that the jury has found him guilty of a capital offense." *Id.* at 103 (emphasis in original). The latter point bears emphasis: by all accounts, Zeitz seems not to grasp that, whatever his strategy was in terms of humanizing Marshall during the trial itself, it was unreasonable for him to have placed so much stock in that evidence *once the jury rendered its verdict.* Zeitz maintains that "the guilt phase of the case has to be looked at to understand what we did in the penalty phase [because] if you

just look at the penalty phase in a vacuum, it looks like there was nothing that was done, no strategy, et cetera, but that wasn't the case." (Test. of Glenn Zeitz at A 143.) But, as summarized in the excerpt above, the penalty phase is a different animal, where the stakes are completely different from those encountered in the guilt phase. With the outright rejection of Marshall's defense, which is the only way the guilty verdict can be interpreted, Zeitz knew that the jury also had rejected the character evidence submitted in support of that defense. Indeed, it would only be fair to assume that they had found Marshall to be a liar and a despicable person for paying someone to have his wife killed. Zeitz's clear duty at that point was to shift his focus away from absolving Marshall of involvement in his wife's murder - certainly, the evidence for the guilt phase had not worked for that purpose - to saving his life. While counsel can harken back to evidence from the guilt phase during the penalty phase, here, Zeitz failed to allude to any of what he thought to be compelling character testimony from the guilt phase. He seemed to assume the jury would consider it anew during the penalty phase. We can only reason that Zeitz *hoped* this would suffice for the simple reason that he had no additional evidence or witnesses, and, he had none because he failed to prepare any witnesses or conduct any investigation into potential penalty phase mitigating evidence or testimony. This omission flies in the face of the "prevailing professional norms" in 1986, which were well-established not only by national ABA standards but in the relevant jurisdiction, as well.

As detailed by the District Court, actual courtroom practice of capital defenders in New Jersey in 1986 reflected an understanding of the obligation to investigate and prepare a case for life. Between 1982, the year the New Jersey state legislature reinstated the death penalty in New Jersey after a ten year hiatus, *see* N.J. Stat. Ann. § 2C:11-3 (West 1982), and the time of Marshall's trial in 1986, there were SS capital cases tried in New Jersey state court. In each and every one of those cases, counsel presented at least some type of penalty

phase mitigation evidence, demonstrating some sort of underlying penalty phase preparation. In 51 of those cases, counsel called at least one witness on behalf of the defendant, and in 47 of those cases called at least one family member. *Marshall VI,* 313 F. Supp. 2d at 441. As explained by Petitioner's expert at the evidentiary hearing before the District Court, this makes sense because the "penalty phase is more about emotions than fact." (Test. of Carl Herman at A875.)

As noted above, the District Court details in its opinion more than a dozen witnesses who would have testified on Marshall's behalf during the penalty phase of the trial. We agree with the District Court that the mere fact of people willing to testify on Marshall's behalf does not demand a finding of ineffectiveness, but it is Zeitz's failure to have discovered and/or spoken to those people in preparation for the penalty phase that constitutes fundamentally inadequate representation. Testimony offered by the State's own expert confirms this view:

> THE COURT: [W]ould you agree that unless [Zeitz has] made an adequate investigation, he's not in a position to determine what he should put on and what he should not put on?
>
> GRAVES: Well, that the - the U.S. Supreme Court has said that, so absolutely.

(Test. of William Graves at A1197.) In other words, the "right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence." *Strickland,* 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (internal citations omitted).

Zeitz's own testimony confirms that he was not ignorant of his obligations as counsel to a capital defendant:

> PETITIONER'S COUNSEL: What was your understanding of the role of the capital defense lawyer at the time [you represented Marshall], is it your understanding that your obligation was to prepare and presumably present a case in mitigation of punishment, notwithstanding your client's wishes?
>
> ZEITZ: Yes, you are - your job ...
>
> PETITIONER'S COUNSEL: Okay.
>
> ZEITZ: Your job is to present a case for life.

(Test. of Glenn Zeitz atA132.) But yet Zeitz had not prepared and thus presented no such case, instead choosing to rest on evidence submitted at trial and obviously, or at least ostensibly, rejected by the jury charged with deciding Marshall's fate. Again, Zeitz has claimed that he was abiding by his client's wishes; however, he testified clearly before the District Court that he knew of his obligation to put on a case in mitigation notwithstanding Marshall's wishes:

> THE COURT: [E]ven if a client says I want to get a death sentence, you would have an obligation to do that ...
>
> ZEITZ: Yes, that's your ethical obligation.

(*Id.* at A 135.) Yet Zeitz testified clearly that he had nothing and no one prepared for a penalty phase hearing.

> RESPONDENTS' COUNSEL: So, my question was then he was convicted on March 5th, 1986, did you have any documents, discovery of any kind, that you were considering to turn over as part of what you were going to present in the penalty phase?
>
> ZEITZ: No.

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> RESPONDENTS' COUNSEL: [D]id you have any other witnesses lined up as potential mitigation witnesses for the penalty phase, prior to reaching this agreement about not calling witnesses?
>
> ZEITZ: No.

(*Id.* at A144-146.)

Perhaps the most glaring of Zeitz's omissions, and what strongly contributes to our rendering the state court's application of *Strickland* to this case "unreasonable," was the failure to interview Marshall's sons, with respect to the penalty phase specifically. Concerning the impact of mitigation witnesses during the penalty phase generally, Petitioner's expert Carl Herman testified:

> Typically what you get are family members, you know, brothers, sisters, children, in the most horrible cases who get on the stand and ... say to the jury, I know that you found my brother, my father, guilty of this crime [and] he's going to have to pay for that for the rest of his life, but he's my father and I love him, and I'm going to visit him in jail, please don't execute him; he can do some good; I need him as a father. It could be two minutes of testimony. [B]ut frequently it's very moving, very emotional.

(Test. of Carl Herman at A875.) Regarding the instant case, the State's own expert testified before the District Court without ambiguity: "I think he should have interviewed all three of the children." (Test. of William Graves at A 1194.) But, as Marshall's youngest son John testified, at no time leading up to or during the trial did Zeitz speak to him about what a penalty phase was or what would happen if his father

was found guilty. When asked by Petitioner's counsel, "At any point did you have an understanding . . . [w]hat would happen in the event your father was found guilty?" John Marshall responded, "No, I didn't." (Test. of John Marshall at A379.) Had Zeitz interviewed Marshall's sons he would have discovered, according to John Marshall's testimony, that each of the boys would have willingly taken the stand and pleaded for the jury to spare his father's life.

> PETITIONER'S COUNSEL: Assuming that you had been asked to [testify] after your father had been found guilty, would you have been willing to do so back in 1986?
>
> JOHN MARSHALL: Most definitely.
>
> PETITIONER'S COUNSEL: And that would have involved the willingness on your part to ask the jury to spare your father's life?
>
> JOHN MARSHALL: Yes, it would have.
>
> PETITIONER'S COUNSEL: How about your brothers, do you believe that your brothers would have been - let's start with Chris first. (A: Okay.) Would he have been willing to testify?
>
> JOHN MARSHALL: Most definitely, yes.
>
> PETITIONER'S COUNSEL: And how about Rob?
>
> JOHN MARSHALL: Yes, most definitely.
>
> ***
>
> PETITIONER'S COUNSEL: Is there any doubt in your mind that both of your brothers would have been willing to testify in front of the jury back in

1986, and ask the jurors to spare your father's life?

JOHN MARSHALL: There is no doubt in my mind.

(*Id.* at A381-383.) Zeitz also would have discovered that not only were Marshall's boys willing to testify, but that the sort of things to which they were prepared to testify could have served as powerful mitigation evidence.

PETITIONER'S COUNSEL: [W]hat would you have wanted the jury to know about your father and your relationship with him before they decided whether he should be put to death?

JOHN MARSHALL: I think I would have told them that my father was a loving father, and devoted to my brothers and I; and he was at every swim meet of ours, at every baseball game that I had, every soccer match that I had; went back to school at nights; playing catch out in the driveway; you know, took us skiing, took us ice boating. He was a very devoted and loving father and still is to this day.

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PETITIONER'S COUNSEL: Now obviously by that point, had you been asked [to testify], you would have been in a position of your father [having] been found guilty of the killing of your mom. How does that figure into your wanting - you would have wanted the jury not to go for the death penalty for your dad?

JOHN MARSHALL: Again, it was one of the hardest things to go through losing a mother at that age, especially in that manner. And I just - I just don't understand to this day why the State of New Jersey would want to take my father away from me.

(*Id.* at A384-386.) Zeitz testified that it was his "belief' that Christopher Marshall would not plead for his father's life if called during the penalty phase. He added that he felt that same way about Robbie Marshall. Zeitz's beliefs stemmed from conversations, he testified, that he had had with Robert Marshall. But counsel's "beliefs" are not a substitute for informed strategy, and even if Zeitz's intuitions had proved correct at the time, his failure to at least approach Marshall's sons to ask what they might say belies comprehension and renders nugatory any purported strategy on his part.

The Supreme Court repeatedly has emphasized that a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. It is for this reason that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted). While these precepts wisely caution against relying too heavily on the clarity often afforded by hindsight, such a concern is absent here. In this case, retrospect affords us the *only* view of what might have been, since Zeitz did nothing at the time; in other words, we are not looking back to evaluate whether Zeitz might have altered in some nuanced way his strategy concerning the Marshall boys but, rather, we are searching for some plausible reason for why he employed no strategy at all. We can find none. Furthermore, as powerful as Zeitz viewed the sons' testimony during the trial to have been, the substance of that testimony gave no clue as to the sons' feelings for their father. It was used instead to establish Marshall's state of mind at the time he placed the phone calls from the hotel. *See supra* note 6. Surely the jury was left wondering why the sons would not have pled for their father's life and could have reasonably

drawn a negative inference from their absence from the courtroom during the penalty phase, as well.

To be clear, this is not a case that calls upon us to define the contours of the "few hard edged rules" spawned by evaluations of counsel's effectiveness. *Rompilla*, 125 S. Ct. at 2462 (noting that the merits of counsel's choices in that case were subject to debate). The Court in *Rompilla* took pains to distinguish the case with which it was presented, where counsel pursued several leads to gather mitigation material but failed to examine a single crucial file, *id.* at 2463-64, from a case such as Marshall's "in which defense counsel simply ignored [his] obligation to find mitigating evidence," *id.* at 2462. *See also White v. Singletary*, 972 F.2d 1218, 1224 (11th Cir. 1992) (stating that "it should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness").

In addition, we view the "agreement" that Zeitz struck with the prosecutor as additional evidence of the abdication of his role. Zeitz did not so much agree to a non-adversarial penalty phase, as he brought it on himself as a result of his own failure to have prepared for that phase of trial. Zeitz was not merely agreeing to hold back on the production of evidence - he had no evidence to introduce. Whether or not the prosecution consented to the "agreement," Zeitz had no witnesses or evidence of any kind prepared to present in mitigation to the jury. Far from a strategic, bargained-for exchange, the agreement appears to have been the only option. Although Zeitz had, in the time leading up to the commencement of the trial, hired investigator Kolins to assist in gathering information relevant to Marshall's case, again, Zeitz testified that at no time did either he or Kolins engage in pointed discussions with individual family members, friends, neighbors, or business associates to determine whether those individuals would be willing to testify at a

penalty phase and, if so, what they might say if called to testify. Agreement or not, Zeitz simply had no penalty phase evidence to present.

As discussed throughout, Zeitz's lack of preparation for the penalty phase is all the more incredible in light of his knowledge from the inception that the case would be a capital one and that his client faced powerful State's evidence.

> PETITIONER'S COUNSEL: My question is, do you agree with the proposition that where your assessment as a capital defense attorney is that the proof of guilt is overwhelming, would you agree with the proposition that that simply highlights or underscores the need for exhaustive preparation for the penalty phase? Do you agree with that?
>
> ZEITZ: I'm saying to you the following - I don't disagree with the proposition.

(Test. of Glenn Zeitz at A447.) Because we affirmatively *agree* with the proposition offered by Petitioner's counsel, we must find that under the prevailing professional norms applicable in 1986, Zeitz's representation, insofar as his failure to investigate or prepare a case for life, was objectively unreasonable.

As to whether Marshall suffered prejudice as a result of Zeitz's actions or inactions, which we must determine under *Strickland,* we explained in *Marshall V* that the prejudice prong is particularly subtle in a "weighing" state like New Jersey: "Given the unanimity requirement, the 'reasonable probability of a different outcome' would mean that only one juror need weigh the factors differently and find that the aggravating factor did not outweigh the two mitigating factors." 307 F.3d at 103. In other words, "even if the aggravating and mitigating factors were of equal weight, under New Jersey's sentencing scheme, the sentence would be

life in prison, not death." *Id.* at 103-04. The New Jersey Supreme Court has thus emphasized, "The importance of the jury's determination cannot be overstated, as the entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die." *State v. Koskovich,* 168 N.J. 448, 776 A.2d *144,* 192 (2001) (internal citations omitted). We found in *Marshall V* that:

> Zeitz did not mention, let alone focus on, the intricacies of the weighing process the jury must go through in considering the various factors, telling the jurors instead that the death penalty can be imposed "if all twelve of you agree to do it unanimously." His last words were not a plea for mercy, but, rather, more akin to a verbal shrug of the shoulders: "whatever you feel is the just thing to do, we can live with it."

307 F.3d at 101. Based on the state court record before us at the time, we determined that it was "impossible for us to conclude that there is not a reasonable probability that the outcome would have been different had counsel done what Marshall urges he should have done." *Id.* at 107. However, given the unknowns at the time of our previous decision, we also were unable to conclude that Marshall had indeed suffered prejudice as a result of Zeitz's then-alleged ineffectiveness. *Id.* We now have the benefit of copious testimony adduced at the evidentiary hearing as well as the District Court's comprehensive analysis of the issues.

Looking at Zeitz's appeal to the jury, one would think that the only two mitigating aspects worthy of consideration by the jury were the two he briefly mentioned - the fact that Marshall was a law abiding citizen, and that he had no significant history of prior criminal activity. But that is not the case. The "catch all" provision of the death penalty statute

-which empowers the jury to consider *"[a]ny other factor* which is relevant to the defendant's character or record or to the circumstances of the offense," N.J. Stat, Ann. § 2C:11-3(c)(S)(h) - is an invitation, and an opportunity, to offer other reasons why life should be spared. Those other reasons were in the minds and voices of the witnesses not interviewed and thus never called, including Marshall's sons. Absent those witnesses, Zeitz had no choice but to argue only those relatively insignificant aspects - essentially applicable to any and every first time offender of a brutal crime - that are anything but "humanizing." And, while the judge no doubt instructed as to the "catch-all" factor, if Zeitz could not even suggest to the jury what those other relevant factors might be, how are the members of the jury to know why they should spare Marshall's life? Zeitz's attempt to point to certain other things - passing references to civic endeavors and attendance at swim meets -without people to vouch for these things as a reason to vote for life, seemed more de-humanizing than humanizing. While the jury did find the "catch-all" mitigating factor to be present, the finding alone is meaningless; it is the "weight" attributed to the factor that is significant. And that weight was clearly affected by the bland emotionless argument and lack of evidence offered by Zeitz.

Strickland admonishes us to focus on "on the fundamental fairness of the proceeding whose result is being challenged" and on whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." 466 U.S. at 696. In this case, the District Court had "no confidence that the penalty phase of Marshall's trial was a genuine adversarial proceeding." 313 F. Supp. 2d at 457. By virtue of the evidentiary hearing, Marshall was able to confirm his allegations of ineffectiveness and establish the reasonable probability that the outcome of the penalty phase of his trial would have been different. *See Strickland,* 466 U.S. at 697. We are confident that Zeitz's numerous failures in investigating and preparing for the penalty phase of the case,

and in putting on and arguing a case for life, prejudiced Marshall. He has thereby satisfied the *Strickland* test. The state court's denial of relief to Marshall based on Zeitz's ineffective assistance during the penalty phase was an "unreasonable application" of this clearly established Supreme Court law and thus Marshall is entitled to relief under the AEDPA. *Williams*, 529 U.S. at 379.

V. CONCLUSION

For the reasons set forth above, we find that the New Jersey Supreme Court's decision "involved an unreasonable application" of the principles announced in *Strickland,* and Marshall is entitled to habeas relief under § 2254(d)(1). Vie will therefore AFFIRM the District Court's Order in all respects. New Jersey must either retry the case on penalty within 120 days or stipulate to a life sentence.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT O. MARSHALL, Petitioner, v. ROY HENDRICKS, Superintendent, New Jersey State Prison, and JOHN J. FARMER, Attorney General of New Jersey, Respondents,	HONORABLE JOSEPH E. IRENAS CIVIL ACTION NO. 97-5618 (JEI) OPINION

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IRENAS, Senior District Judge:

Currently before the Court is Petitioner's application for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The application comes to the Court on remand from the United States Court of Appeals for the Third Circuit as to the sole issue of whether Petitioner's counsel was constitutionally effective at the sentencing phase of Petitioner's capital murder trial. After holding an evidentiary hearing on Petitioner's claim, we find that counsel was not effective and grant Petitioner's application for writ of habeas corpus.

I.

The procedural history of this case is extensively discussed in previous decisions of both this Court and the United States Court of Appeals for the Third Circuit. *See Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002) (*"Marshall V"*); *Marshall v. Hendricks*, 103 F. Supp. 2d 749 (D.N.J. 2000) (*"Marshall IV"*).[1] Therefore, we will avoid an

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[1]The post-trial history of this case relevant to this opinion is (continued...)

exhaustive recital of the procedural history and provide only a brief summary in order to put the current matter in context and to include the most recent proceedings. On May 5, 1986, Robert 0. Marshall ("Marshall" or "Petitioner") was convicted in New Jersey state court of murder and conspiring to murder his wife, Maria Marshall, and was sentenced to death by lethal injection. *Marshall IV*, 103 F. Supp. at 757. Marshall's direct appeals at the state level were unsuccessful and, on October 30, 1997, he filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this Court.[2] Marshall's twenty-two count petition included claims of ineffective assistance of counsel at both the guilt and sentencing phase of his trial as well as requests for discovery and evidentiary hearings to explore those claims. On June 23, 2000, this Court, relying on the state court record and without holding separate evidentiary hearings, denied Marshall's application in its entirety. Id. Marshall then appealed to the Third Circuit.

On September 11, 2002, the Third Circuit affirmed this Court's denial of Marshall's application for writ of habeas corpus as to all issues except Marshall's claim of ineffective

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[1](...continued)
comprised of five separate decisions: State v. *Marshall, 586* A.2d 85 (N.J. 1991) *("Marshall I")* (direct appeal); State v. *Marshall,* 613 A.2d 1059 (N.J. 1992) *("Marshall II")* (proportionality review); State v. *Marshall, 690* A.2d 1 (N.J. 1997) ("Marshall III") (post-conviction relief appeal); *Marshall v. Hendricks,* 103 F. Supp. 2d 749 (D.N.J. *2000)("Marshall* IV")(application for writ of habeas corpus); and *Marshall v. Hendricks,* 307 F.3d 36 (3d *Cir. 2002) ("Marshall V") (appeal of district court's* denial of *writ).*

[2] *The* appeals *process in this* case is *thoroughly* discussed in *Marshall V, 307* F.3d at 49-50.

assistance of counsel during the sentencing phase of his trial. On that issue, the Third Circuit reversed and remanded, concluding that a determination of counsel's effectiveness at sentencing was impossible "without conducting an evidentiary hearing." *Marshall V,* 307 F.3d at 117. Pursuant to the Third Circuit's remand, this Court held an evidentiary hearing in September 2003, and heard final oral arguments on January 30, 2004, to determine the merit of Petitioner's claim that his counsel failed at every level to investigate, prepare, present, and argue a mitigation case during the penalty phase of his trial. See Br. Supp. Pet'r Robert O. Marshall's Pet. Writ Habeas Corpus at 51 [hereinafter Pet'r.Br.].

II.

As with the procedural history, the facts of this case have been thoroughly discussed in prior court decisions, see *Marshall* V, 307 F.3d at 44-48; *Marshall IV,* 103 F. Supp. 2d at 758-59; *State v. Marshall,* 690 A.2d 1, 23-25 (N.J. 1997) *("Marshall III") ; State v. Marshall,* 586 A. 2d 85, 97-114 (N. J. 1991) *("Marshall I"),* therefore, the Court will relate only those facts relevant and necessary to the disposition of Petitioner's claim of ineffective assistance of counsel at the penalty phase.

On the morning of March 5, 1986, after a month-long trial, Robert Marshall was convicted of murder and conspiracy to commit murder in Superior Court of New Jersey, Criminal Division, Atlantic County for hiring someone to murder his wife, Maria.[3] *Marshall IV,* 103 F. Supp. at 757. Marshall was represented by Glenn Zeitz, a private attorney with experience defending capital cases. Tr.

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[3]The trial began on January 27, 1986. *Marshall V,* 307 F.3d at 46. Closing arguments were held on March 3, 1986. *Id.* at 48. The court instructed the jury on March 4th and the jury returned with its verdict on the morning of March 5th. *Id.*

Sept. 3, 2003, Test. of Glenn Zeitz at 134, l. 9-22; Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 4-5.[4]

The jury rendered its verdict at approximately 11:30 a.m.[5] *See Marshall V,* 307 F.3d at 48 (stating that the verdict came in "shortly before noon"); *Marshall III,* 690 A.2d at 108 (Handler, J., dissenting) (stating that the jury returned its verdict "at approximately 11:30 a.m."). Immediately thereafter, Marshall's family members, including his youngest son John, his sister Oakleigh, and his brother Paul, left the courthouse to return to their home in Toms River, New Jersey, which is located roughly forty-five minutes away. Tr.

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[4]Marshall hired Zeitz in late September, 1984. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 9, l. 17-19.

The issue of the quality of Zeitz's representation at the guilt phase of the trial is not before us. The New Jersey Supreme Court, this Court and the Third Circuit have consistently found that during the guilt phase, Zeitz provided Marshall with constitutionally effective representation. See *Marshall IV,* 103 F. Supp. 2d at 790; *Marshall V,* 307 F.3d at 88-94; *Marshall I,* 586 A.2d at 171 (finding that defense counsel "provided a zealous and conscientious defense of his client throughout this protracted trial. Counsel was obviously well-prepared, thoroughly familiar with the record, and persistently and forcefully advocated his client's interests throughout the guilt phase proceedings").

[5]The precise timing of the events surrounding the verdict and the penalty phase has been clouded by the general chaos that erupted in the courtroom when the verdict was delivered. See Tr. Sept. 9, 2003, Test. of Glenn Zeitz at 16, l. 16-17 (characterizing the atmosphere in the courtroom after the verdict was read as "pandemonium"). However, although the precise timing is unclear, the general sequence of the day's developments are not in dispute.

Sept. 3, 2003, Test. of Douglas DeCarlo at 142, l. 10-18; Tr. Sept. 4, 2003, Test. of John Marshall at 133, l. 5-25. They did not return for the sentencing phase; indeed, nothing in the record indicates that they knew or understood that the penalty phase would be held that same day. Tr. Sept. 4, 2003, Test. of John Marshall at 133; l. 17-25; 134, l. 1; Tr. Sept. 8, 2003, Test. of Richard Ruffin, Jr. at 19, l. 15-21 (indicating that Oakleigh DeCarlo "rushed John, the youngest son, out of the courtroom in order to avoid the press and the activity and she thought that the penalty phase would follow in a few days and she was very surprised that the penalty phase went on in her absence"); Tr. Sept. 3, 2003, Test. of Douglas DeCarlo, at 143, l. 2-7 (stating that he "couldn't imagine" that his wife Oakleigh would have left the courthouse and not been present for the penalty phase had she known about it).

At approximately the same time, Marshall fainted while being led from the courtroom by Sheriff's officers. *Marshall V,* 307 F.3d at 48; *Marshall III;* 690 A.2d at 108 (Handler, J., dissenting). An ambulance was called at 11:36 a.m. and medical personnel took Marshall to a nearby hospital where he was treated by an emergency room physician at approximately 12:30 p.m. *Marshall V,* 307 F.3d at 48; *Marshall III,* 690 A.2d at 109 (Handler, J., dissenting). The hospital discharged Marshall at approximately 1:15 p.m., at which time Sheriff's officers returned him to the courthouse. *Marshall V,* 307 F.3d at 49; *Marshall III, 690* A. 2d at 109 (Handler, J., dissenting). Marshall arrived at the courthouse at approximately 1:30 p.m., fifteen minutes.- before the penalty proceeding began. *Marshall V,* 307 F.3d at 49.[6]

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[6]Both the Third Circuit and the New Jersey Supreme Court put Marshall back at the courthouse at roughly 1:30. *Marshall V,* 307 F.3d at 49; *Marshall III,* 690 A.2d at 109 (Handler, J., dissenting) (noting that Marshall was discharged at 1:15

(continued...)

While Marshall was being treated at the hospital, Zeitz met with the prosecution regarding the penalty proceeding. Zeitz testified that he "extracted" an agreement from the prosecution as to how the penalty phase would be conducted. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 20, l. 12-25. The parties agreed that: (1) both the prosecution and the defense would waive openings, refrain from presenting evidence and limit themselves to a single short closing statement to the jury; (2) the prosecution would dismiss two of the three aggravating factors charged;[7] and (3) the prosecution would stipulate to a single mitigating factor, namely, that Marshall

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[6](...continued)
and that "according to the Sheriff's officers" the trip from the hospital to the courthouse 'took between fifteen and twenty-five minutes"). In contrast, Zeitz testified that he believed he "had more than 15 minutes to talk" with his client. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 23, l. 18-20. The Court is persuaded, however, that Marshall could not have returned to the courthouse before 1:30 p.m.

Ultimately, however, the precise amount of time is not at issue. It is sufficient to say that there was a relatively brief period of time, less than 30 minutes, between Marshall's return from the hospital and the start of the penalty phase.

[7]The prosecution had charged three aggravating factors: (1) that the "defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value" (N.J. Stat. Ann. § 2C:11-3c(4)(e)); (2) murder for pecuniary gain (N.J. Stat. Ann. § 2C:11-3c(4)(d)); and (3) the heinous nature of the offense (N.J. Stat. Ann. § 2C:11-3c(4)©)). See Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 19, l. 1-14; *Marshall I*, 586 A.2d at 114. The prosecution agreed to dismiss the second and third of the factors. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 19, l. 25 to 20, l. 6.

did not have a prior criminal record.[8] Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 1920; *see also* Tr. Sept. 8, 2003, Test. of Kevin Kelly at 151.

In arranging this agreement, Zeitz relied on information he had gathered in his investigation for the guilt phase. Prior to May 5, 1986, Zeitz had not specifically prepared for a potential penalty hearing. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 7579, 82, 111. Neither Zeitz nor his investigator, Russell Kolins, ever had a targeted conversation with individual family members, friends, neighbors, or business associates to determine: (1) if any of those individuals would be willing to testify at a penalty phase should Marshall be found guilty; or (2) what those persons might say if called to testify.. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 75, 1. 8 to 76, 1. 16; 82, 1. 8-19; 126, 1. 4-13.[9] Moreover, Zeitz had not hired a mitigation specialist, social worker, or

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[8]N.J. Stat. Ann. 2C:11-3c(5)(f) provides that "the mitigating factors which may be found by the jury or the court [include that the] defendant has no significant history of prior criminal activity." The other mitigating factor presented to the jury was a "catch-all" factor set forth in N.J. Stat. Ann. 2C:11-3c(5)(h) which provides that the jury may consider "any other factor which is relevant to the defendant's character or record or to the circumstances of the offense."

[9]Kolins does claim to have had such conversations, however, he has no notes of such conversations, he cannot identify names of the persons with which he spoke, nor can he identify the content of those discussions. Tr. Sept. 9, 2003, Test. of Russell Kolins at 218-219; 220; 230-31; 234. Zeitz's files do not contain these notes either, even though Kolins claims to have turned over his notes to Zeitz. See *Id.* at 251-52; see also Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 111, 1. 14-18.

psychologist[10] to evaluate Marshall, to interview potential witnesses, to investigate his school or medical records, or to conduct an investigation into the existence of any potentially mitigating information. Tr. Sept. 3, 2003, Test. of Glenn

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[10]Marshall did receive mental health treatment prior to the start of the trial. Following an apparent suicide attempt on September 27, 1984, Marshall was briefly admitted to Point Pleasant Hospital. Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 30, l. 3-17. After Zeitz was notified of Marshall's condition, he contacted Dr. Elliot Atkins and arranged for him to talk to Marshall. *Id.* at 32, 34 (indicating that

> if I had a situation, I would have like this, you'd have to get a psychologist or a psychiatrist, you got to get somebody to get in there and find out what the dynamics are in someone's mind, because it could affect a substantive defense, or how you handle a mitigation aspect of a case).

Marshall was then transferred to the Institute of Pennsylvania Hospital, a psychiatric facility, where he was treated by Dr. David Walzer. *Id.* at 41-42 (indicating that Dr. Walzer told Zeitz that Marshall was narcissistic and manipulative, that he was behaving in a sexually provocative way with staff members and seemed to exhibit no remorse over the death of his. wife); see also Tr. Sept 11, 2003, Test. of Elliot Atkins at 34-37 (describing Marshall's stay at the Institute and noting that Dr. Walzer told Atkins that Marshall was depressed).

However, although Zeitz did obtain Marshall's medical records from his time at Point Pleasant, he admits that he never asked Dr. Atkins or Dr. Walzer for a report or diagnosis of Marshall's mental state, nor did he know if a diagnosis was ever made. *Id.* at 44, l. 8-16; 46, l. 11-25; see *also* Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 201, l. 25 to 202, l. 21.

Zeitz at 111, 119-120. Therefore, at the end of the guilt phase, Zeitz did not have a draft list of potential mitigating factors, penalty phase discovery, or penalty phase witnesses. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 64-66.[11]

Regardless, Zeitz prepared to go forward with the penalty phase that afternoon. In the fifteen minutes between Marshall's return to the courthouse and the start of the sentencing hearing, Zeitz had two conversations with his client regarding how to proceed. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 22, l. 2-12; 24, l. 1-13; 25, l. 1-9. The first conversation focused on the agreement made with the prosecution and whether Marshall's sons should testify in the penalty phase. *Id.* at 25, l. 1-9; 35-36. In that discussion, Marshall stated that he did not want his sons to testify and that he approved the agreement. *Id.* The second conversation confirmed with Marshall that they would proceed as per the agreement. Id. Zeitz claims that he told his client that they could request a continuance, but Marshall did not want to wait. *Id.* at 26, l. 3-25. In fact, Marshall said that he just wanted to get it over with. Tr. Sept. 9, 2003, Test. of Robert Marshall at 28, l. 13-18 (indicating that upon his return from the hospital, Zeitz told him they could "do this now or later. What do you want to do" and that Marshall replied, "[l]et's get it over with"). Zeitz, therefore, did not request a

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[11]The prosecutor in the case, Kevin Kelly, testified that when Zeitz approached him after the guilty verdict to discuss the penalty phase, Zeitz "asked me if I was going to produce any evidence [at the penalty hearing]. I said, well, that's going to be up to you in terms of what you're going to do. And he said, well, I've already, in terms of mitigating factors, I've already presented everything during the course of my case in chief and during the trial and there is *really nothing I can add to it.*" Tr. Sept. 8, 2003, Test. of Kevin Kelly at 151, l. 2-19 (emphasis added).

continuance.

The penalty phase began at 1:45 p.m. with the parties explaining their agreement to Judge Manuel Greenberg outside the presence of the jury.[12] At 1:55, the jury was

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[12]Tr. of Proceedings at 5-9, *New Jersey v. Marshall,* N.J. Super. Ct. Crim. Div., Atlantic County, Indictment No. 26-1-85, Supreme Court Docket No. 25532 (March 5, 1986). The transcript of that discussion is as follows:

> THE COURT: Gentlemen, we're now prepared, I believe, to move on to the penalty phase of this matter. I did have a discussion with counsel in chambers regarding the procedure that we're going to follow, and before we place that on the record, are counsel in agreement that that is the procedure that will be followed?
> MR. ZEITZ: Yes, sir.
> MR. KELLY: Yes, sir, your Honor.
> THE COURT: As I understand it, what will now occur is that I will now make the usual opening statement to the jury that is made in this proceeding. I believe that the law now is - I know that the law now is, expressly, that any evidence which was introduced in the trial can be considered as evidence for purposes of this proceeding. Given that, I understand that neither counsel intend to introduce any further evidence in this proceeding.
> MR. KELLY: That's correct, Judge.
> MR. ZEITZ: That's correct, Judge. I would like, at least, to have the record reflect that I've had an opportunity to speak with my
>
> (continued...)

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[12](...continued)

client and discuss his right, if he desired, to call any witnesses with regard to the penalty phase of the proceedings, and it's his desire, and it is also my feeling, that we do not intend to call any witnesses at this stage of the proceedings. And we've had, I believe, an opportunity to discuss this, and this is his intention.

It's also based on the understanding that what we will do procedurally, is that Mr. Kelly and I will not make any opening statement to the jury at the penalty phase, but, in essence, what we will do is, I will make my summation arguments and then Mr. Kelly will make his to the jury.

I've aslo [sic] explained to my client, as part of this proceeding, which I think I should spread on the record, that the State, in its argument on the penalty phase, will be proceeding on one aggravating factor, and this is aggravating factor two as outlined in the notice of aggravating factors that was filed in this case at or about the time of the return of the indictment, which states that the defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

I've also explained to my client that there are

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[12](...continued)

two mitigating factors which I will be arguing to the jury at the penalty phase, number one - and I might add, Judge, that we did file, even though it was certainly premature, but we did file a notice of mitigating factors earlier in the case; specifically, that the defense will argue, number one, that defendant Robert O. Marshall has no history of prior criminal activity, and, I believe, I asked the Court in chambers to delete the word significant, because that seems to relate to a situation that where someone may have something - some blemish in their past, and the jury has to make some consideration as to whether or not that's significant or not, and I think the State is at least prepared to at least stipulate on the record that he has no history of prior criminal activity and, therefore, that, in essence, is a mitigating factor that they must find on his behalf.

Second, we will be arguing an additional mitigating factor which deals with anything that may relate to the character of the defendant, which I believe is the last mitigating factor that's referred to in the statute, and we are going to be arguing certain things with regard to his character which we'd ask the jury to consider as a mitigating factor. I've explained to my client, in essence, that this is the procedure that I would like to adopt

(continued...)

called in, and after introductory statements by Judge Greenberg, counsel made their closing statements to the jury. *Id.* As per the agreement, Zeits spoke first. The entirety of Zeitz's statement is as follows:

> MR. ZEITZ: Yes. Thank you, your Honor. It would be an understatement for me to say that this is not a difficult moment for me, and I'm sure it's difficult for everyone in terms of the proceedings that we now have to deal with.

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[12](...continued)

> and follow at this stage, and it's my understanding that he is in agreement with this procedure.
> THE COURT: Very well. And, Mr. Kelly, I suppose you're in agreement with the procedure that we're about to follow.
> MR. KELLY: Yes, your Honor, I am.
> THE COURT: So then, first Mr. - following my statement, Mr. Zeitz would speak, followed by the Prosecutor, followed by my instructions.
> MR. KELLY: Yes, sir.
> MR. ZEITZ: Judge, can I ask this? Since we have agreed at least as to the one mitigating factor, perhaps I'm not sure how your Honor wanted to address that, but perhaps in the very beginning it can be stated to them, at least, that this is a mitigating factor which must be found by them, and the other - because that would pretty much set forth the ground rules of what would be left.
> THE COURT: Very well. I'll inform them of it. Can we have the jury, please?

What, in essence, we are at right now at this stage is a situation where the State has agreed that there is one mitigating factor which you must find exists in the case, and that that [sic] Rob Marshall has never had any type of criminal record of any kind.

The reason why I believe, when you look to the legislative history of the death penalty when it came into New Jersey that that clearly is a mitigating factor, is because, if you will, people feel, and I think quite rightly, that if you live a law-abiding life, that at some point in time you may be in a position where you may have to ask people to allow you to draw, if you will, maybe a credit because of the fact that you've led such a life. There are people obviously who have not led law-abiding lives and have been in situations where they've been in front of a jury and the jury has convicted them of a capital offense, and the jury will hear that this person has led a life, not law-abiding, but in fact, has had a juvenile record, has had a record of other offenses and, for the most part, has lived a life that in all ways, shapes, and forms never conformed to what our society at least requires.

In this particular case it's been agreed that Rob Marshall has led a law-abiding life, and that you must consider that as a mitigating factor.

The State has one aggravating factor which they are going to ask you to consider, and that is the fact, under the statute, [illegible] offense as you have found - and at this point, as a lawyer, I have to accept that you have found that - was procured by the payment or the thought of payment for some pecuniary gain.

The other mitigating factor that Judge Greenberg referred to deals with other circumstances and

factors which a jury may consider in mitigation with regard to the death penalty. In this particular case, in addition to the fact that Rob Marshall has no prior criminal record, there's certain things, at least with regard to his life, that he has done, which he is entitled for you to consider.

He was involved in, among other things, with the Ocean County Businessmen's Association. You've heard that. He was campaign chairman for United Way, and for a number of years worked with them in community affairs, raising money for United Way. In addition to that, he served with his family on various social activities, involving the swim leagues and certain other things of a community nature.

I don't want to stand here and go through the whole litany of things that he's done in forty-six years that - either for other people or for his family or of a civic nature. Suffice it to say, the record is substantial in that area, and you have an absolute right to consider that as a mitigating factor.

As the Judge told you, now, in terms of a defense, we do not have to prove to you that the mitigating factors in some way outweigh the aggravating factor. The State has to prove to you, beyond a reasonablbe [sic] doubt, and you certainly know what that standard is, because you've been told that and you've been explained that by counsel, you have to use that standard when you determine whether or not you feel he deserves the death penalty.

One thing I have to tell you about this, which I think makes it an individual decision for each one of you, and that is that the only way that the death penalty can be imposed is if all twelve of you agree to do it

> unanimously. So that you, in essence, have a power in your hands that, quite candidly, I would never have in my hands, because, as a lawyer, we generally don't serve as jurors. So I have-no way of knowing what it must be like.
>
> All I can say is this, that I hope when you individually consider the death penalty, that you're each able to reach whatever opinion you find in your own heart, and that whatever you feel is the just thing to do, we can live with it.

Tr. of Proceedings at 14-17, *New Jersey v. Marshall,* N.J. Super. Ct. Crim. Div., Atlantic County, Indictment No. 26-1-85, Supreme Court Docket No. 25532 (March 5, 1986). Mr. Zeitz did not present any witnesses, did not present any documentary or physical evidence and did not make a plea for his client's life. Tr. Sept 3, 2003, Test. of Glenn Zeitz at 13, l. 6-19; 112, l. 13-24. Marshall did not speak on his own behalf. The Government then made its presentation.[13] After

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[13]Tr. of Proceedings at 17-19, *New Jersey* v. *Marshall, N.J.* Super. Ct. Crim Div., Atlantic County, Indictment No. 26-1-85, Supreme Court Docket No. 25532 (March 5, 1986). Mr. Kelly's statement to the jury is as follows:

> MR. KELLY:
> Ladies and gentlemen of the jury, there's not much more that I can say. You heard all the evidence in the case and all of the evidence presented, and in that regard I would ask you to accept that testimony for the purposes of your deliberations during this phase.
>
> The Court was correct in indicating that it is the State's position that the aggravating factor

(continued...)

[13](...continued)

> in this case is that this murder was committed by a defendant who paid a sum of money or gave a promise to pay an additional sum of money to have his wife killed, and that is our position as far as the aggravating factor is concerned.
>
> I really cannot think of anything more heinous in our society than to, you know, hire somebody to kill somebody else, let alone a family member; in this case, your wife.
>
> I would say to you, ladies and gentlemen, that you took an oath which you have followed so far in applying the law, and the law, as far as this stage is concerned and which his Honor will tell you, is that you have to determine whether or not that aggravating factor exists and whether or not the mitigating factors exist and whether those mitigating factors outweigh that aggravating factor. And I say to you, ladies and gentlemen, to be fair about it. I cannot see how those mitigating factors come even close to, let alone outweigh, this aggravating factor.
>
> Maria Marshall had no prior criminal history. Maria Marshall was civic-minded, and this defendant did not give her the option of thirty years.

(continued...)

receiving their instructions and deliberating for ninety minutes, the jury sentenced Marshall to death by lethal injection. *Marshall V,* 307 F.3d at 98; *Marshall I,* 586 A.2d at 114.

III.

28 U.S.C. § 2254, the statute governing federal court review of habeas petitions brought by persons "in custody pursuant to the judgment of a State court," permits that review only where the petitioner alleges that he "is in custody in violation of the Constitution or laws or treaties of the United States." 2254 (a) (2004). Only after a petitioner successfully proves that he or she "seeks to apply a rule of law that was clearly established at the time his [or her] state-court conviction became final," may a federal court assess the merits of the habeas application. *Williams v. Taylor,* 529 U.S. 362, 390 (2000) (finding that the phrase "clearly established" "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision").

In evaluating the merits of a habeas application, a federal court is permitted to grant a writ only where it finds that the adjudication of the claim on the merits in State court:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

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[13](...continued)

> And so I would ask you to continue with your deliberations and follow the law as his Honor instructs. Thank you.

presented in the State court proceeding.

28 U.S.C. § 2254(d);[14] *see also Marshall V*, 307 F.3d at 50; *Marshall IV,* 103 F. Supp. 2d at 772-773.[15]

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[14]This standard reflects the narrowing of habeas relief effectuated by Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214. The effect of AEDPA has been, in part, to "increase[] the deference federal courts must give to the factual findings and legal determinations of the state courts." Werts v. *Vaughn,* 228 F.3d 178, 196 (3d Cir. 2000); *see also Bell v. Cone*, 535 U.S. 685, 693 (2002) (noting that AEDPA amended habeas review "in order to prevent federal habeas `retrials' and to ensure that state court convictions are given effect to the extent possible under law"); *Dickerson v. Vaughn,* 90 F.3d 87, 90 (3d Cir. 1996). In addition to narrowing the scope of habeas review for prisoners in state custody, AEDPA imposes a one-year statute of limitations on petitions and prohibits successive petitions unless specifically approved by a circuit court. *See* Erwin Chemerinsky, Federal Jurisdiction § 15.2 (3d ed. 1999) (discussing the changes brought about by AEDPA); 28 U.S.C. § 2241-2256.

[15]In enacting AEDPA, the Supreme Court has stated that "it seems clear that Congress intended. federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ." *Williams*, 529 U.S. at 386. The Supreme Court also noted, however, that merely because the "mood" of the statute suggests that federal courts must take care before finding a state-court decision constitutionally infirm, the statute does

(continued...)

In *Williams*, the Supreme Court clarified the meanings of "contrary to" or "an unreasonable application of" Supreme Court precedent.[16] 529 U.S. at 413 (stating explicitly that the two phrases have independent meanings). A state court decision is contrary to Supreme Court precedent if the state

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[15](...continued)
not require that "federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error." Id. at 387 (noting that the word "deference" does not appear in the statute); *see also Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996), *rev'd on* other *grounds*, 521 U.S. 320 (1997) (stating that although § 2254 "requires us to give. state courts' opinions respectful reading, and to listen carefully to their conclusions, [] when the state court addresses a legal question, it is the law `as determined by the Supreme Court of the United States' that prevails").

[16]Prior to the *Williams* decision, "several courts [had] recognized [that] the text of AEDPA offers little guidance to the courts charged with applying it." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 887 (3d Cir. 1999) (en banc) (citing *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (colorfully noting that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting"); *O'Brien v. Dubois, 145* F.3d 16, 20 (1st Cir. 1998), *overruled* by 303 F.3d 24 (1st Cir. 2002) (describing AEDPA as "hardly a model of clarity . . . and its standard of review provision is far from self-explicating")). Thus, prior to *Williams*, federal courts had interpreted 28 U.S.C. § 2254(d) as amended by AEDPA in widely disparate ways. *See Matteo*, 171 F.3d at 885-888 (discussing how different circuits had interpreted AEDPA's standard of review provision).

court reached a "conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.*; *see also Bell v. Cone,* 535 U.S. 685, 694 (2002); *Williams v. Price,* 343 F.3d 223, 228-29 (3d Cir. 2003); *Werts,* 228 F.3d at 195-96. A state court's application of Supreme Court precedent is unreasonable "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 365, 408, 413. An unreasonable application must be "more than incorrect or erroneous" it must be "`objectively unreasonable.'" *Wiggins v. Smith,* 123 S. Ct. 2527, 2535 (2003); *see also Lockyer v..Andrade,* 538 U.S. 63, 75 (2003); *Williams,* 529 U.S. at 409-411.

Thus, to successfully apply for writ of habeas corpus under § 2254, Petitioner must demonstrate that: (1) at the time of his trial, the Supreme Court's standard for ineffective assistance of counsel was clearly established; and (2) the state court decision either contradicts that standard, *Williams*, 529 U.S. at 405-06, or the "decision evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified." *Werts*, 228 F.3d at 204; *see also Matteo*, 171 F.3d at 888; *Rompilla v. Horn,* 355 F.3d 233, 250 (3d Cir. 2004), *reh'g denied*, 359 F.3d 310 (3d Cir. 2004).

As to the first element of a successful § 2254 application, Petitioner has met his burden of claiming a violation of a clearly established constitutional right. The Supreme Court first articulated the standard for ineffective assistance of counsel claims under the Sixth Amendment in *Strickland v. Washington,* 466 U.S. 668 (1984), a full two years prior to Marshall's trial. Since that time, the Court has consistently applied the standard and recognized its clarity for the purposes of § 2254 petitions. *See, e. g., Williams*, 529 U.S. at 390 (finding that petitioner met his burden under § 2254

where he claimed ineffective assistance of counsel, the merits of which were "squarely governed by . . . *Strickland*"). Thus, the Court may evaluate the substance of Petitioner's claim that the New Jersey Supreme Court's determination that he "was provided effective assistance of counsel at the penalty phase of his capital trial was contrary to, and an unreasonable application of, *Strickland v. Washington,* "requiring habeas relief. Pet'r. Br. at 47.

IV.

A.

The Sixth Amendment to the Constitution recognizes that defendants in criminal trials have a right to counsel in order to ensure that those trials are fundamentally fair.[17] *See U. S. v. Cronic,* 466 U.S. 648, 653 (1984) (recognizing that the "accused's right to be represented by counsel is a fundamental component of our criminal justice system"); *Powell v. Alabama,* 287 U.S. 45, 69 (1932) (noting that a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him"); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) (characterizing criminal defense attorneys as "necessities, not luxuries"); *Johnson v. Zerbst,* 304 U.S. 458, 462-63 (1938) (finding that the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"); *see also Rompilla v. Horn,* 359 F.3d 310, 310 (3d Cir. 2004) (asserting that "[a]ll other rights will turn to ashes in the hands of a person who is without effective, professional, and zealous representation when accused of a crime") (Nygaard, J.); *United States* ex rel.

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[17] "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Williams v. *Twomey*, 510 F.2d 634, 640 (7th Cir. 1975) (stressing the importance of counsel by writing that "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators"); Walter V. Schaefer, *Federalism & State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956) (noting that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have").

Yet, the mere presence of a lawyer does not satisfy the Sixth Amendment's mandate; ultimately, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The fact that "a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685; see also *United States v. Ash*, 413 U.S. 300, 309 (1973) (noting that the "core purpose of the counsel guarantee was to assure 'Assistance' at trial"); *Argersinger v. Hamlin*, 407 U.S. 25; 31-32 (1972); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (recognizing that "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment" of an attorney). Inasmuch as an effective attorney is required "to assure fairness in the adversary criminal process," *United States v. Morrison, 449 U.S. 361, 364 (1981)*, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Because the penalty phase in a capital case "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" and because "counsel's role in the proceeding is comparable to counsel's role at trial," the analysis of an ineffective assistance of counsel claim is the same for both the guilt and, penalty phases of capital trials. *Id.* at 686 (internal citations omitted); *see also*

Wiggins, 539 U.S. at 510 (applying the *Strickland* standard to petitioner's claim that counsel was ineffective at the penalty phase of his capital trial); *Bell*, 535 U.S. at 658; *Burger*, 483 U.S. at 776; *Darden v. Wainwright*, 477 U.S. 168, 184 (1986).[18]

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[18]Commentators have unsuccessfully called for a more stringent standard for defense counsel in capital cases. For example, Gary Goodpaster argues that:

> (t]he existence of a penalty phase in capital trials makes such trials radically different from ordinary criminal trials. A full capital trial is in fact two separate but intimately related trials: a preliminary guilt trial focusing on issues pertaining to the commission of a capital offense, and a subsequent penalty trial about the convicted defendant's worthiness to live. The guilt trial establishes the elements of the capital crime. The penalty trial is a trial for life. It is a trial for life in the sense that the defendant's life is at stake, and it is a trial about life, because a central issue is the meaning and value of the defendant's life . . . The penalty phase of a capital trial differs so greatly from an ordinary criminal trial that the usual standards for assessing competency of counsel in criminal cases are inadequate in death penalty cases.

Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 303-05 (1983); *see also The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923 (1994) (arguing that "capital trials are so complex, and the death penalty so different in kind from other

(continued...)

Therefore, to successfully assert a claim for ineffective assistance of counsel, a defendant must prove: (1) "that counsel's performance was deficient" by showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) that defendant was prejudiced by the errors.[19] *Strickland,* 466 U.S. at 687; see *also Rompilla,* 355 F.3d at 246; *Berryman,* 100 F.3d at 1094.

Under the first prong of the test, defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Reasonableness is defined "by prevailing professional norms" accepted at the time of the representation. *Id.* at 688. In the instant case, the standards at issue are those accepted in 1986.[20] This element does not require that a defendant receive perfect representation, but it does require that counsel act within the "wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689; *see also Burger v. Kemp,* 483 U.S. 776, 794 (1987); *Kokoraleis v. Gilmore,*

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[18](...continued)
punishments, that, for capital defendants, the Eighth Amendment requires a higher standard of effective assistance of counsel").

[19]Courts presume that "the lawyer is competent to provide the guiding hand that the defendant needs, [therefore,] the burden rests on the accused to demonstrate a constitutional violation." *Cronic,* 466 U.S. at 658 (citing *Michel v. Louisiana,* 350 U.S. 91, 100-101 (1955)); *see also Strickland,* 466 U.S. at 687; *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000).

[20]We will discuss the precise contours of those norms in Part IV.B.2.a, infra.

131 F.3d 692, 696 (7th Cir. 1997) (noting that "[t]he Constitution is satisfied when the lawyer chooses a professionally competent strategy that secures for the accused the benefit of an adversarial trial"); *Berryman v. Morton,* 100 F.3d 1089, 1101 (3d Cir. 1996) (stating "[t]he right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued"); *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (finding that "perfection is not required" under the Sixth Amendment). To satisfy the second prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A defendant's burden to prove ineffective counsel "is a heavy one."[21] *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000). As the Supreme Court has stated, "[j]udicial scrutiny of counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. "There is a `strong presumption' that counsel's performance was reasonable." *Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir. 2001); *see also Bell,* 535 U.S. at 687 (noting that defendants must "'overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy"'") (quoting *Berryman,* 100

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[21]For example, courts have found that counsel was effective where an attorney slept during a case, *McFarland v. Texas,* 928 S.W.2d 482, 505 (Tex. Crim. App. 1996); where an attorney was "under the influence of alcohol" during trial, *Haney v. Alabama,* 603 So.2d 368, 377-78 (Ala. Crim. App. 1991); and where counsel failed to present any evidence during sentencing, *Mitchell v. Kemp,* 762 F.2d 886, 888 (11th Cir. 1985).

F.3d at 1094); *see also Michel v. Louisiana,* 350 U.S. 91, 101 (1955). This deference makes "strategic choices made after thorough investigation of law and facts relevant to plausible options . . . virtually unchallengeable." 466 U.S. at 690-91.

However, although the choices counsel makes with regard to strategy are nearly unassailable when made after a complete investigation of the facts and circumstances of the case, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of the investigation." *Strickland,* 466 U.S. at 690-91. This fact sensitive inquiry acknowledges that strategic decisions can vary greatly from attorney to attorney and from case to case, but also demands that legal representation be based upon a comprehensive understanding of the underlying facts and circumstances of each individual defendant and each individual case. *See Strickland,* 466 U.S. at 688 (finding that "[m)ore specific guidelines are not appropriate" and that "the (p] roper measure of attorney performance remains simply reasonableness under prevailing professional norms").

Having articulated both the standard for habeas review and the standard for the analysis of claims of ineffective assistance of counsel, we now turn to the application of these frameworks to Petitioner's claim that the New Jersey Supreme Court arrived at a decision contrary to or which constituted an unreasonable application of *Strickland.*

B.

1.

As discussed above, a decision contrary to Supreme Court precedent is one in which the state court arrives at a "conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case

differently than [the Supreme Court) has on a set of materially indistinguishable facts." *Williams,* 529 U.S. at 413. We reject Petitioner's contention that the New Jersey Supreme Court's adjudication of Marshall's appeal was contrary to the holding in *Strickland.* Not only did the New Jersey Supreme Court correctly identify *Strickland* as the governing legal standard for claims of ineffective assistance of counsel based on the failure of counsel to appropriately investigate and present a mitigation case in the penalty phase of a capital trial, *see Bell,* 535 U.S. at 697-98; *Darden,* 477 U.S. at 184; *Burger,* 483 U.S. at 788, but the Court also applied that framework in reaching its decision. See *Marshall III,* 690 A.2d at 34, 80-82 (clearly stating that Marshall's claims "are evaluated under the standards set forth in" *Strickland); Marshall I,* 586 A.2d at 171. Therefore, the court did not reach a "conclusion opposite to that reached by the Supreme Court on a question of law."

Nor are we persuaded that the New Jersey Supreme Court decided the case differently than the United States Supreme Court on a set of materially indistinguishable facts. Although several Supreme Court decisions have applied *Strickland to* ineffective assistance of counsel claims at the sentencing phase of a capital trial, all are factually distinguishable from the present case. *See, e. g., Wiggins,* 123 S. Ct. 2527 (2003) (where defendant was tried by a judge, not a jury; was represented by two public defenders rather than private counsel; where the parties conducted a full-fledged penalty phase; and where defendant had a history of sexual abuse); *Williams,* 529 U.S. 362 (2000) (where defendant confessed to killing two persons; had a history of criminal activity including theft, assault and arson; where counsel engaged in a full penalty hearing and not only introduced testimony from defendant's mother, neighbors and a psychiatrist, but also made a plea for mercy); *Bell,* 535 U.S. 685 (2002) (where

defendant was convicted of two counts of first degree murder; conceded that he had committed the murders but raised an insanity defense permitting the introduction of extensive mitigation testimony during the guilt phase; and where counsel made a plea for his client's life at sentencing). Thus, the sole remaining issue is whether Petitioner is entitled to relief on the ground that the state court decision was an unreasonable application of *Strickland.*

2.

Petitioner's specific claims regarding Zeitz's representation can be grouped into two categories: "(1) lack of consultation, preparation, and investigation by counsel, and (2) lack of content or substance in counsel's representation at the penalty phase." *Marshall V,* 307 F.3d at 98-99. In the first category, Petitioner specifically alleges that: (1) Zeitz failed to prepare for or investigate a case for life; (2) Zeitz failed to discuss the penalty phase with Marshall; and (3) Zeitz failed to request an adjournment and permitted the penalty phase to commence immediately after Marshall's return from the hospital. *Id.* at 98. In the second category, Petitioner alleges that: (1) Zeitz failed to present mitigating evidence during the penalty phase; (2) Zeitz failed to humanize Marshall; and (3) Zeitz failed to make a plea for his client's life. *Id.* We will address each category in turn.

a.

Petitioner first claims that he did not receive effective assistance of counsel because Zeitz failed to investigate or prepare a case for life. "While `[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness' it is unclear how detailed an investigation is necessary" to ensure effective counsel under *Strickland. White v. Singletary,* 972 F.2d

1218, 1224 (11th Cir. 1992) (internal citation omitted). Satisfying *Strickland's* investigation mandate, therefore, ultimately turns on counsel's adherence to the professional standards for investigation and preparation of a mitigation case at the time of trial. In defining what constitutes a complete investigation in this matter, therefore, we look to the prevailing professional nc ms as they existed in 1986.

In 1986, the ABA Standard for Criminal Justice ("Standard") stated:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard for Criminal Justice, 4-4.1 (2d ed. 1980); *see also Strickland,* 466 U.S. at 688-89 (discussing the use of ABA standards as guides for determining "prevailing norms of practice"); *Rompilla,* 355 F. 3d at 259 n.14 (referring to the ABA standards as "important guides" although cautioning against viewing them as "a codification of the requirements of the Sixth Amendment"). The Standard, coupled with *Strickland's* explicit language requiring a thorough investigation into facts relevant to both guilt and sentencing, clearly show that a separate penalty phase investigation was the very foundation of reasonable representation in 1986. *See Strickland,* 466 U.S. at 690-91.

Actual courtroom practice of capital defenders in New Jersey also reflects their understanding of this obligation to

investigate- In the fifty-five capital cases tried in New Jersey state courts between 1982[22] and the spring of 1986 when Marshall was convicted and sentenced, counsel in every case presented at least some type of penalty phase mitigation evidence, illustrating an underlying penalty phase investigation. In all but four of those cases, counsel called at least one witness on behalf of the defendant, and in the vast majority (forty-seven out of fifty-five), called at least one family member. *See* Def. Ex. 14 (providing a summary of each of the fifty-five cases);[23] *see also* Tr. Sept 11, 2003, Test. of William Graves at 70, l. 22 to 71, l. 11 (indicating that both private attorneys and public defenders trying cases at the time uniformly introduced at least some testimony at the penalty phase); Tr. Sept. 10, 2003, Test. of Carl Herman at 36, l. 1-5 (noting that in eighty to ninety percent of the capital cases tried in New Jersey in the early 1980's at least one family member testified for the defendant at the penalty

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[22]1982 was the year that the New Jersey state legislature reinstated the death penalty in New Jersey after a ten-year hiatus. N.J. Stat. Ann. § 2C:11-3 (West 1982); *see also State v. Funicello,* 286 A.2d 55 (N.J. 1972) (accepting the United States Supreme Court's declaration that the New jersey death penalty statute was unconstitutional and striking the statute). For a discussion of the history of the death penalty in New Jersey, see Edward Devine, et al., *Special Project: The Constitutionality of the Death Penalty in New Jersey,* 15 Rutgers L. J. 261 (1984).

[23]The chart provided the following information for each of the cases: (1) the case name; (2) whether defense counsel was a public or private attorney; (3) the sentence imposed; (9) testimony or evidence offered in the penalty phase; (5) the nature of the State's evidence and the type of defense offered; and (6) the length of time between the guilt phase verdict and the penalty phase verdict. Def.'s Ex. 14.

phase). Further, in the few penalty hearings where counsel relied predominately on evidence presented during the guilt phase, that evidence was clearly mitigating in nature.[24] These cases, taken as a whole, show that New Jersey attorneys trying capital cases in the early to mid-1980's recognized and complied with a professional standard for investigation that included interviews with family members and other witnesses, an examination of an array of other mitigation evidence, and presentation of that evidence at sentencing.[25]

Thus, it is clear that in light of *Strickland's* holding, the ABA Standards and the practice of New Jersey attorneys in 1986 that capital defense attorneys were expected to conduct a separate investigation into facts relevant to a penalty phase.[26] The standards and practices of the day underscore

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[24]Counsel in those cases relied on medical testimony regarding defendant's mental capacity, psychological evidence relating to emotional disturbance or insanity or some form of serious childhood abuse or trauma. *See* Def. Ex. 14.

[25]Indeed, these cases show capital defenders introducing evidence ranging from mental retardation, insanity, childhood trauma and abuse to close and loving family relationships, pleas for mercy and perceptions of emotional harm to defendant's family members should the defendant receive a death sentence. *See* Def. Ex. 14.

[26]In addition, scholarly commentary written prior to 1986 provided guidance to capital defenders with regard to the scope and importance of investigation prior to the sentencing phase of capital trials. In stressing the need for thorough investigation, Gary Goodpaster noted that

> [i]mportant consequences flow from the fact that both as a legal and a practical matter, the

(continued...)

the reality that:

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[26](...continued)

> penalty phase is a trial for life. Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized.

Goodpaster, *supra*, at 324; *see also* Ivan K. Fong, Note: *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 480-81 (1987) (citing trial manuals available for capital defenders including those produced by the Southern Poverty Law Center and the California Office of the State Public Defender and suggesting that "courts should regard any decision not to investigate or present mitigating evidence as tending to indicate ineffective assistance of counsel").

Goodpaster also notes that, "[t]he timing of this investigation is critical. If the life investigation awaits the guilt verdict, it will be too late. Although a continuance should be requested and may be granted between the guilt and penalty phases of the trial, it is likely to be too brief to afford defense counsel the opportunity to conduct a substantial investigation." Goodpaster, *supra*, at 324.

> "[the] right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Accordingly, counsel's general duty to investigate takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

Strickland, 466 U.S. at 706 (Brennan, J. concurring) (internal citations omitted).

Thus, although no "absolute duty exists to investigate particular facts or a certain line of defense," *Chandler*, 218 F.3d at 1317, counsel "has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary." *Strickland*, 466 U.S. at 691. Here, Zeitz's representation fell below the professional standard because he failed to conduct **any** investigation into possible mitigating factors and provides no objectively reasonable justification for failing to do so. See, e. g., *Dobbs v. Turpin*, 142 F.3d 1383, 1387 (11th Cir. 1998) (affirming the district court's finding that defense counsel's representation was ineffective where counsel had failed to conduct a reasonable investigation of defendant's background and produced no mitigating evidence at the penalty phase); *Horton v. Zant*, 941 F.2d 1449, 1462, 1462-463 (11th Cir. 1991) (finding defense counsel's representation deficient during the sentencing phase where counsel failed to investigate and present mitigating evidence and attacked the client's character and separated himself from his client during his closing statements); *cf. Rompilla*, 355 F.3d at 250-53 (rejecting petitioner's ineffective assistance of counsel claim at sentencing where defense counsel had a good working

relationship with defendant, questioned him extensively about his background, interviewed defendant's siblings and other family members and hired three mental health professionals to evaluate defendant in preparation for the penalty phase).

First, Zeitz's testimony and notes indicate that neither he nor his investigator, Russell Kolins, ever had a single targeted discussion with any member of Marshall's family, with his clergy, or with neighbors, friends or business associates regarding either their willingness to testify at a penalty phase or what they would say if called to testify.[27] This failure to investigate is particularly troubling given the apparent plethora of potentially useful mitigation witnesses available to the defense at the time of the trial.[28] Petitioner has identified

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[27]Zeitz relied on Kolins to investigate for the guilt phase. Zeitz did not hire a separate investigator for the penalty phase or a mitigation specialist to assist in preparing for sentencing. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 111, l. 19 to 112, l. 1. Although there is evidence to suggest that retaining a mitigation specialist was standard practice in 1986, *see* Tr. Sept. 10, 2003, Test. of Carl Herman at 44, l. 17-21, the Court does not find that failure to hire a mitigation specialist to prepare a social history is *per se* unreasonable.

[28]The Court is aware that "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating (] evidence, had they been called or . . . had they been asked the right questions." *Waters v. Thomas*, 46 F.3d 1506, 1513-14 (11th Cir. 1995) (en banc). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." *Id.* Thus, we are not swayed by the mere existence of the list

(continued...)

sixteen people who have indicated that neither Zeitz nor Kolins ever: (1) spoke to them about a penalty phase; (2) asked them if they would be willing to testify at a penalty phase; or (3) asked them what they would be willing or able to say if they did testify. Every one of those sixteen people has stated that had he or she been asked, he or she would have agreed to provide mitigation testimony on Marshall's behalf. The list includes: Thomas North, Marshall's childhood friend;[29] Paul Marshall, Marshall's brother; [30] Cathy Clement,[31] Mary Jane Dougherty[32] and Oakleigh

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[28](...continued)
of persons willing to testify on Marshall's behalf. Rather, we find Zeitz's failure to interview any of them unreasonable.

[29]North indicated that he would have told the jury that he loved Marshall, that executing him would be a hardship on North and his family and he would have asked the jury to spare Marshall's life. Tr. Sept. 8, 2003, Test. of Richard Ruffin at 32-33.

[30]Paul Marshall indicated that he would have told that jury that he loved his brother, that executing him would be a hardship to both Marshall's sons and siblings and would have asked the jury to spare his brother's life. Tr. Sept. 8, 2003, Test. of Richard Ruffin at 30, l. 8-22 (stating that Paul told him that Marshall's execution "would be devastating to my sisters, especially my younger sister Cathy, and it would be devastating to Rob's youngest son John").

[31]Clement would have testified that she loved her brother, that she believed Marshall loved his sons, that his sons would have been harmed if he was executed, that she feared for John Marshall's mental health if his father was executed and that Marshall's execution would "'give me a nervous

(continued...)

DeCarlo,[33] Marshall's sisters; Michael Conlin[34] and Bill

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[31](...continued)
breakdown.'" Tr. Sept. 8, 2003, Test. of Richard Ruffin at 28, 1. 19 to 29, 1. 6. Clement also would have asked the jury to spare her brother's life. *Id.* at 28, 1. 9-11.

[32]Dougherty also would have asked the jury to spare her brother's life because a death sentence would be an emotional hardship on Marshall.'s sons and his siblings. Tr. Sept. 8, 2003, Test. of Richard Ruffin at 27, 1. 10-25. Dougherty also could have testified to Marshall's involvement with his sons' activities and his love and support for the three boys. *Id.* at 28, 1. 1-8.

[33]Oakleigh died in 1998, but prior to her death spoke with Richard Ruffin in his capacity as an investigator for the New Jersey Public Defender. Oakleigh would have testified that she "loved her brother and she would have asked the jury specifically to spare his life." Tr. Sept. 8, 2003, Test. of Richard Ruffin at 19-21. Oakleigh also would have described her warm and loving relationship with her brother, his position as a role model in her family when they were growing up, his joy in being a father, and his love and support for his sons. *Id.* at 21-24. Oakleigh also would have testified to her belief that executing Marshall would emotionally damage his sons, particularly John. *Id.* at 24. Oakleigh's husband Douglas DeCarlo also testified to her close bond with Marshall and to his belief that "without a doubt" she would have been "able and willing" to testify as a mitigation witness. Tr. Sept. 3, 2003 at 141.

Counsel's failure to talk to Oakleigh is all the more puzzling given her extensive involvement with the case. Oakleigh was in regular contact with Zeitz, frequently

(continued...)

Lundy,[35] acquaintances from the Tom's River Swim Program; Reverend James McColl, Marshall's prison minister;[36] Nikki Daly, Marshall's long-time secretary;[37] Thomas and Lynn

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[33](...continued)
attended the trial, testified in the guilt phase on Marshall's behalf and had provided Zeitz with family photographs for use at sentencing. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 67, l. 8-23 (indicating that he and Oakleigh communicated on a weekly basis and that "she was like a lifeline in terms of keeping me abreast of what was going on with the boys").

[34]Conlin would have agreed to testify to Marshall's on-going support of the high school swim team, his fund-raising for the team and support of his son John's involvement in swimming. Tr. Sept. 8, 2003, Test. of Richard Ruffin at 35-36 (stating that Conlin said he "never had a negative experience with Marshall").

[35]Lundy could have testified to Marshall's involvement in fund-raising for his son's swim team activities and that "'Rob did a lot for kids.'" Tr. Sept. 8, 2003, Test. of Richard Ruffin at 36-37.

[36]Reverend McColl began ministering to Marshall after his arrest and continues to provide spiritual counseling to Marshall today. Tr. Sept. 8, 2003, Test. of Lois Nardone at 162, l. 18-25. McColl would have been willing to testify that he was ministering to Marshall and that it was his belief that Marshall was "truly sincere in his interest to embrace the Christian faith." *Id.* at 165, l. 7-19.

[37]Daly would have testified that Marshall was very involved in community activities such as the United Way, that he was
(continued...)

Fenwick, Marshall's neighbors;[38] Stanley Slaby, Marshall's friend;[39] Henry Tamburin[40] and Ev Hutchison,[41] Marshall's

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[37](...continued)
a good employer who treated her well, the he was a considerate and generous man who was supportive of her when her husband died. Tr. Sept. 8, 2003, Test. of Richard Ruffin at 38, 1. 10-24; *see also* Tr. Sept. 8, 2003, Test. of Carol Krych at 190-194.

[38]Mrs. Fenwick indicated that she would have described Marshall as a pleasant, easy-going man who was dedicated and devoted to his family. Tr. Sept. 8, 2003, Test. of Carol Krych at 196, 1. 18-25 (noting that she knew Marshall because their children swam together on a local team). Mr. Fenwick described Marshall similarly and indicated that he could have testified to Marshall's devotion to his children. *Id.* at 197, 1. 13-24. Mr. Fenwick also indicated that although he believed Marshall to be guilty, he did not believe he deserved the death penalty. *Id.* at 199.

[39]Slaby would have testified that he knew Marshall through the Tom's River Country Club, that Marshall was "very, very fond of his sons, [and that] he did a lot with them and for them." Tr. Sept. 8, 2003, Test. of Lois Nardone at 172-73. Slaby also would have described Marshall as a "hard worker who provided well for his family." *Id.* at 173, 1. 20-22.

[40]Tamburin could have testified to his belief that Marshall "'really loved his kids'" and that "'he was very supportive and encouraging to their dreams.'" Tr. Sept. 8, 2003, Test. Lois Nardone at 170, 1. 20-25. Tamburin described Marshall as smart, hard-working and well-respected in the community.
(continued...)

business associates; Douglas DeCarlo, Marshall's brother-in-law;[42] and John Marshall, Marshall's youngest son.[43] Zeitz also failed to interview potential expert witnesses available to

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[40](...continued)
Id. at 171, l. 2-8.

[41]Hutchinson indicated that he would have been willing to testify that Marshall was a genuine, hard-working man. Tr. Sept. 8, 2003, Test. of Carol Krych at 202, l. 11-20.

[42]DeCarlo testified that he would have been willing to testify as a mitigation witness in Marshall's penalty proceedings, but that he was never asked. Tr. Sept. 3, 2003 at 145, l. 3-7, 12-16. DeCarlo testified further that he would have told the jury that Marshall "was a very caring and loving father" who was involved in his sons' lives, who "provided very well for them, often rearranged his work schedules to be able to participate in their activities, and just seemed to be a real good father." *Id.* at 145, l. 17 to 146, l. 1. DeCarlo also indicated that, despite his belief in the death penalty and the fact that he had considered the possibility that Marshall was, in fact, guilty, he would have testified as a mitigation witness. Id. at 161, l. 9 to 162, l. 13.

[43]John Marshall testified that neither Zeitz nor Kolins ever explained what a penalty phase was or asked him if he would be willing to testify. Tr. Sept. 4, 2003 at 133-134. John stated that he "most definitely" would have testified if asked, that he would have asked the jury to spare his father's life and would have told the jury that "my father was a loving father, and devoted to my brothers and I." *Id.* at 134-138.

him.[44]

In addition, neither of Marshall's two other sons, Robby and Chris, were asked to testify at the penalty phase. The record is clear that neither Zeitz nor his investigator Kolins ever specifically asked the boys what they thought, if they would be willing to testify or what they might say if called. *See* Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 35, l. 14-19 and at 40, l. 5-8; Tr. Sept. 10, 2003, Test. of Russell Kolins at 251-55; 258-59 (testifying that although he asked Robby and Chris once if they would be willing to testify as mitigation witnesses, he never followed up on their inconclusive responses of "I'll think about it" (Chris) and "I'11 let you know" (Robby)).

Zeitz offers several explanations for why he never interviewed any of these individuals. Zeitz argues that his decision not to call Robby or Chris was based on his "understanding" that both boys believed their father was guilty and would not testify on his behalf. Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 40, l. 23 to 41, l. 7 and at 51, l. 4-7.

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[44]For example, Zeitz had available to him experts such as Isaac Ballard who testified that he would have been willing and able to provide information regarding the contribution Marshall could have made in the prison system. Tr. Sept. 8, 2003, Test. of Isaac Ballard at 100-102; 111 (stating that, in 1986, similar experts were available and had provided mitigation evidence of this type); *see also* Tr. Sept. 10, 2003, Test. of Carl Herman at 58, l. 19 to 59, l. 22 (indicating that experts such as Ballard were called in the mid-1980's to provide mitigation testimony). Zeitz also had contact with Dr. Elliot Atkins, who could have provided testimony regarding the potential harm that Marshall's execution could have had for Marshall's sons. Tr. Sept. 11, 2003, Test. of Elliot Atkins at 42-46.

However, it is clear from the testimony before this Court that no one was certain exactly what the boys believed. Their uncle Douglas DeCarlo, brother and father all believed that the boys supported their father until at least a year after the trial. *See* Tr. Sept. 3, 2003, Test. of Douglas DeCarlo at 144, l. 1-8 (stating that the boys remained supportive of their father during the trial and that all three would have been willing to ask a jury to spare their father's life); Tr. Sept. 4, 2003, Test. of John Marshall at 132-34 (testifying that "there was no doubt in his mind" that his brothers would have asked a jury to spare their father's life, and that the night before the verdict the three boys "assumed their father was going to be acquitted"); Tr. Sept. 9, 2003, Test. of Robert Marshall at 32 (stating that he and his sons "were all very close, very tight. They were all very supportive and they were until a year after the trial"). In contrast, Ted Serrao testified that both Robby and Chris began to believe their father was guilty in the months subsequent to their mother's murder. Tr. Sept. 11, 2003, Test. of Ted Serrao at 810, 22-23 (although admitting he never spoke with the boys directly about whether they thought their father should be executed). Even if the boys firmly believed in their father's guilt, however, it does not automatically follow that they would be unwilling to plead for his life. Family members who believe in a defendant's guilt can still be valuable mitigation witnesses. See Tr. Sept. 8, 2003, Test. of Richard Ruffin at 1617 (testifying that even family members who believe in a defendant's guilt can "absolutely" be mitigation witnesses); Tr. Sept. 11, 2003, Test. of William Graves at 44, l. 6-13 (stating that he believed that a child can believe in his or her parent's guilt and still ask a penalty phase jury for mercy); Tr. Sept. 3. 2003, Test. of Douglas DeCarlo at 161, l. 9 to 162, l. 13 (testifying that despite his belief in the death penalty and the fact that he had considered the possibility that Marshall was, in fact, guilty, he would have testified on his behalf and asked the jury to spare Marshall's life); see also Tr. Sept. 8, 2003, Test. of Carol Krych at 199 (testifying that Tom Fenwick told her that although he believes Marshall to be guilty, he does

not think Marshall deserves a death sentence). Therefore, Zeitz had no reasonable basis not to interview both boys.[45] Strikingly, even the State's own witness, William Graves, testified that he believed Zeitz should have interviewed all three boys directly. Tr. Sept. 11, 2003, Test. of William Graves at 80, l. 12-22; 82-83;[46] *see also* Tr. Sept. 10, 2003,

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[45]Zeitz also testified that he accomplished all he intended with respect to the boys testifying when he put them on the stand to address their father's state of mind on September 27, 1984. Tr. Sept. 3, 2003, Test. of Glenn-Zeitz at 47, l. 1-20; 54, l. 14-17 (testifying that "the bottom line is once I was satisfied that I got the boys in the guilt phase, and I saw the reaction of the jury in the guilt phase of the case" he was content not to use the boys in the penalty phase); Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 121-122 (stating that he thought he had hit a "triple" with the boys' testimony and agreeing with the Court that he did not believe there was anything more he "could do to increase the impact of that testimony").

However, the boys' testimony was limited to describing their father's state of mind during three separate phone calls Marshall made to each boy on September 27, 1984, prior to Marshall's attempted suicide. Pet. App. at 50-69. John testified that his father sounded depressed and upset. *Id.* at 55-56. Chris testified that his father sounded nervous and that he sounded like he was saying goodbye. *Id.* at 57-60. Robby's testimony was slightly more encompassing, as he also testified to the events of September 6, 1984, but as to the phone call he stated that his father sounded "shaky." *Id.* at 60-69.

[46]In addition to stressing that Zeitz should have interviewed both Robby and Chris Marshall, Graves testified that he would not have "written off" Oakleigh as a mitigation witness

(continued...)

Test. of Carl Herman at 32, l. 12-16 (testifying that, in his expert opinion, "Zeitz failed to properly investigate, identify and present a case for life for Robert Marshall. And in my opinion that was - did not meet the prevailing norms of representation in a capital case in 1985").

With regard to John Marshall, Zeitz expressed concern that it would hurt Marshall to call only John, rather than all three boys. Tr. Sept-. 4, 2003, Test.. of Glenn Zeitz at 127, l. 8-20 (wondering how it would look to the jury if he put only one of the boys on to testify in the penalty phase). Not only does this concern provide absolutely no explanation for why Zeitz did not at least interview John, it also makes an unreasonable assumption that the jury would be unwilling to spare Marshall's life for the sake of one child. *See* Tr. Sept. 10, 2003, Test. of Carl Herman at 174, l. 10 to 175, l. 10 (stating that even if the two oldest boys were unwilling to testify, "[t]he jury can save Marshall's life for the sake of his youngest son"); *see also* Tr. Sept. 8, 2003, Test. of Richard Ruffin at 16, l. 6-17 (stating that he found the Marshall case "lacking" because Zeitz did not call Marshall's sons to testify and that by not having even one of his sons in the courtroom during the penalty phase, Zeitz created the "opposite effect of having a child testify"). Zeitz not only assumed, without any basis in fact, that Robby and Chris would not plead for their father's life, but he also squandered the opportunity to measure the scope and strength of John Marshall's testimony by failing to interview him or have his investigator do so.

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[46](...continued)
without talking to her either. Tr. Sept. 11, 2003, Test. of William Graves at 83, l. 12-18.

Graves further testified that without conducting an "adequate investigation, (Zetiz was] not in a position to determine what he should put on and what he should not put on." *Id.* at 81, l. 12-17. A point with which this Court heartily agrees.

With regard to family members, friends, neighbors, business associates and other identified potential witnesses, Zeitz's only justification for not interviewing them is that he was "aware" that the community in which Marshall lived had turned against him in the time preceding and during the trial. Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 80, l. 21-23; 83-84; 198, l. 8-15; 204207. This explanation is wholly unreasonable. There is absolutely nothing to suggest that because community sentiment was against Marshall, individuals within that community would not testify on his behalf. Therefore, we are persuaded that Zeitz's decision not to conduct targeted interviews or discussions with any potential penalty phase witnesses was unreasonable and constitutes deficient representation under *Strickland.*

Petitioner also asserts that Zeitz's lack of investigation is evidenced in his failure to obtain records or documentary evidence of Marshall's charitable activities. We find this argument less compelling. Petitioner argues that it was unreasonable for Zeitz to fail to contact the United Way to gather documentation of Marshall's involvement with that organization when Zeitz was aware of Marshall's fund-raising. *See* Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 90, l. 16-20 (testifying that he never contacted anyone at the United Way to obtain documents or any other records regarding Marshall's participation with the group's activities). However, on this point, we are satisfied that Zeitz acted reasonably. Zeitz elicited testimony from Marshall during the guilt phase that briefly described Marshall's involvement with the United Way. Post-Evidentiary Hr'g App. Resp't at 65, Test. of Robert Marshall (stating that he was involved in the Tom's River Rotary, local business associations, the YMCA, and the United Way as the fund-raising chairman in 1982-83). Zeitz then reminded the jury of that testimony at the penalty phase. Although we find Marshall's testimony on this point extremely limited (comprising less than a paragraph of the trial transcript and introduced as basic background information) we are unwilling to say that Zeitz did not make

a tactical decision to remind the jury of Marshall's testimony and expect that they would take it into account rather than to present a series of documents or records to catalogue Marshall's charitable contributions.

Petitioner next claims that Zeitz's preparation for the penalty phase was constitutionally deficient because Zeitz failed to consult with Marshall. In *Strickland,* the Supreme Court clearly stated that among counsel's basic duties is the obligation to "function as an assistant to the defendant . . . to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland,* 466 U.S. at 688; see *also Lewis v. Johnson,* 359 F.3d 646, 660-61 (3d Cir. *2004).* The decision about how to proceed as to a penalty phase of a capital trial is clearly one such important decision. Further, "[b]ecause the reasonableness of counsel's acts (including what investigations are reasonable) depends `critically' upon `information supplied by the [petitioner]' or `the [petitioner's] own statements or actions,' evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims." *Chandler,* 218 F.3d at 1318 (citing *Strickland,* 466 U.S. at 690). Without sufficient consultation, a defendant cannot make informed decisions about how to proceed with a case for life nor can he provide counsel with family or medical history, contact information for potentially helpful witnesses or any other mitigating information. Marshall testified that prior to the guilty verdict, he and Zeitz never specifically discussed the possibility, structure, or procedure of a penalty phase. Tr. Sept. 9, 2003, Test. of Robert Marshall at 5, 1. 12-16; 7, 1. 9-15; 15, 1. 11 to 17, 1. 15.[47] Further, Zeitz did not explain

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[47]In fact, Marshall testified that any knowledge he had about the structure of a penalty phase he obtained from other inmates while he was incarcerated during his trial. Tr. Sept.

(continued...)

to Marshall that he had the right to allocute at the penalty phase. Tr. Sept.3, 2003, Test. of Glenn Zeitz at 114, l. 8-14 (stating that he told Marshall he had the right to speak to the jury, but couched it in terms of testifying, rather than clearly explaining that Marshall had the right to make an unsworn statement asking for mercy); *see also* Tr. Sept. 9, 2003, Test. of Robert Marshall at 30, l. 12 to 31, l. 10; 123, l. 17-25 to 124, l. 1-4[48] (indicating additionally that had he known of his right to allocute he would have asked the jury to spare his life so as "not to make orphans out of my sons").

There is little doubt that Zeitz never had a specific or definitive conversation about strategy, evidence, or witnesses for the penalty phase with Marshall prior to Marshall's return from the hospital on May 5, 1986. *Marshall V,* 307 F.3d at

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[47](...continued)
9, 2003, Test. of Robert Marshall at 121, l. 7 to 122, l. 6.

[48]During his direct testimony, Marshall and the Court had the following exchange:

> THE COURT: Let me stop there for a minute. At any time after the verdict came in, did Mr. Zeitz ask you if you wanted to address the jury? Let's forget the word "allocute."
>
> Did you want to talk to the jury on your behalf during the death penalty phase? Did he ask you that?
> THE WITNESS: No sir, he didn't.
> THE COURT: At any time before the verdict came in, did he ask you if you wanted to do that?
> THE WITNESS: No, sir.
> THE COURT: Okay. Did the judge ask you?
> THE WITNESS: No, sir.

102 (noting that in the thirty pages of notes Zeitz produced for the period between December 1984 and January 1986, "there is no reference to any discussion of the penalty phase"); Tr. Sept. 9, 2003, Test. of Robert Marshall at 7, l. 13-15 (stating that Zeitz continually reassured him that he would not be convicted and not to worry about anything, but never discussed the penalty phase with him). When Zeitz did confer with his client, the conversation took less than 15 minutes, was conducted in the wake of the devastating guilty verdict coupled with a medical incident, and focused on presenting an agreement to Marshall that Zeitz had "extracted" without doing any investigation into a mitigation case. We find that this perfunctory communication falls far short of the type of consultation necessary to satisfy *Strickland's* mandate or the Sixth Amendment.

Finally, Petitioner contends that Zeitz improperly permitted the penalty phase to commence a mere two hours after the guilty verdict was rendered. Although Marshall was physically and emotionally fit to proceed with the penalty phase, *see Marshall IV*, 103 F. Supp. 2d at 791 (citing the post-conviction relief hearing finding that despite Marshall's fainting spell, he was fit to proceed), by not requesting a continuance Zeitz was forced to go forward without having conducted any investigation into a case for life. We are convinced that no reasonable attorney in Zeitz's position would have gone forward without an adjournment.[49] Zeitz

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[49]In addition to gaining time to conduct an investigation, such a delay would have given not only the jury an opportunity to distance itself from its verdict, but also Zeitz and his client time to consult and regroup. *See* Tr. Sept. 10, 2003, Test. of Carl Herman at 37-39 (discussing the importance of a continuance after a jury verdict not only because a jury who has just found a defendant guilty is likely "not in a forgiving

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did not have a single witness ready to testify, nor was he aware of any useful mitigating evidence aside from a cursory understanding of Marshall's charitable work and the fact that he had no prior criminal record. Zeitz's decision to move forward also ensured that Marshall's family would not be present during the proceedings because Marshall's sister Oakleigh had taken John and other family members home earlier in the day, mistakenly believing that the penalty phase would not start that afternoon. This situation is entirely different than that of *United States v. Lewis*, 786 F.2d 1278, 1283 (5th Cir. 1986), in which the Fifth Circuit held that counsel's decision not to request a continuance was not ineffective where there was no showing that new evidence would have been found that would have had any effect on the trial. Here, however, a continuance would have permitted Zeitz to discover a substantial number of willing witnesses, including family members who could have testified on Marshall's behalf. Therefore, a continuance was absolutely necessary in this case and Zeitz acted unreasonably by not requesting one.

Although we find Zeitz's representation deficient based on his lack of pre-penalty phase investigation, we are sensitive to the fact that Marshall may well have constrained Zeitz's ability to pursue mitigation evidence while the guilt phase of the trial was ongoing. *See* Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 44, l. 8-13.[50] It is clear that Marshall was

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[49](...continued)
mood," but also because there is no "downside" to the request).

[50]Zeitz made it clear in his testimony that he felt constrained by Marshall's insistence "during the entire course of my representation, that I not say or do anything with the children, with family members, that in any way, shape or form would

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and is a strong-willed[51] and challenging client who, despite his claims to the contrary, restricted Zeitz's ability to raise the possibility that he would be found guilty with members of the Toms River community or Marshall's family.[52] *Id.*; *see also* Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 50, 1. 21 to 51, 1. 14 (indicating that Zeitz found Marshall to be a "difficult client to control" from the earliest stages of their relationship). However, the fact that Marshall put up barriers to discussions of a penalty phase does nothing to relieve Zeitz of his constitutional duty as an attorney. *Strickland* permits attorneys to curtail or limit their investigations where "a defendant has given counsel reason to believe that pursuing certain investigations would be *fruitless or even harmful.*" 466 U.S. at 691 (emphasis added). "But where a client is

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[50](...continued)
indicate that I had anything other than complete belief in his innocence." Tr. Sept. 3, 2003 at 44, 1. 8-13; 42, 1. 16-19 (stating that Marshall wanted him to "be very careful in the way I conducted myself with his family members"). Zeitz indicated that he conducted his representation "in order to honor [Marshall's] feelings." *Id.* at 44, 1.21-25. Zeitz also stated that he felt there was no way to talk to Marshall's sons about the possibility of a penalty phase without violating Marshall's dictates. *Id.* at 45, 1. 3-16.

[51]Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 55, 1. 9-13 (describing Marshall as a strong-willed, educated and articulate client who was "firm in his position he had done nothing wrong, and he didn't want anything other than one hundred percent loyalty from anybody").

[52]In contrast to Zeitz's testimony, Marshall testified that he never put any restrictions on Zeitz with regards to his ability to talk to family members. Tr. Sept. 9, 2003 at 19, 1. 12-22.

[merely] recalcitrant, courts have been ambivalent in whether counsel is relieved of *any* further duty of investigation." *Marshall V,* 307 F.3d at 103 (emphasis in the original); *see also Coleman v. Mitchell,* 268 F.3d 417, 449-450 (6th Cir. 2001) (finding that "defendant resistance to disclosure of information does not excuse counsel's duty to independently investigate"); *Emerson v. Gramley,* 91 F.3d 898, 906-907 (7th Cir. 1996). Here, Marshall neither did nor said anything to suggest to Zeitz that discussions with either his .sons or his other family members would be fruitless or harmful to a case for life. Marshall only insisted that those around him focus on a denial defense. Even when clients strongly assert their innocence and refuse to discuss the possibility of being found guilty, an attorney must find a way to prepare for and investigate a mitigation case. *See* Tr. Sept. 10, 2003, Test. of Carl Herman at 40, 1. 13-15 (stating that "it was very clear in the early 80's that perhaps the most important thing you could do in a death penalty case is prepare for the penalty phase").[53] This is particularly true, when, as here, the

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[53]Where the client has family members available to the defense, that preparation, at the very least, requires that counsel

> have a conversation with the family early on, where you sit down . . and say . . . I'm representing your [family member], he's in a tough spot, we're going to fight this case; he says he's not guilty, that's our plea, we're going to trial, we're not going to give up. But you have to understand New Jersey now has a death penalty, and maybe you don't know that because, you know, it's new, but your [relative] is in danger of being executed if things don't go right here; and I don't want to talk to you about it, but I have to talk to you

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prosecution's case is "weighty and compelling." *Marshall I*, 586 A.2d at 97; *see also* Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 84, l. 11; 199, l. 19 to 200, l. 1 (stating that "[t]he State had a very strong case" and agreeing with the statement that a strong case for the prosecution "simply highlights or underscores the need for an exhaustive preparation for the penalty phase"). No matter how difficult, Zeitz had an obligation either to convince Marshall to cooperate with him in preparing a case for life, or to find a way to conduct an investigation without Marshall's assistance.[54] *See* Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 46, l. 13 to 47, l. 20; 52, l. 8-20 (indicating that he recognized an attorney's obligation to prepare and present a mitigation case, regardless of his client's wishes).

Even if this Court assumes, for the sake of argument

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[53](...continued)

> about it, because I'm not doing my job unless I talk to you about it. And I'm going to talk to your [relative] about it, and you and I, you got to tell me how you feel about your [relative], you got to tell me what you're prepared to say; come up with some memories; come up with some feelings, you know. that type of thing.

Tr. Sept. 10, 2003, Test. of Carl Herman at 40-41.

[54]*See* Tr. Sept. 10, 2003, Test. of Carl Herman at 43-44 (stating that even where a client is against the prepartion of a mitigation case, "it's difficult, but it can be done. I mean I've done it and other lawyers have done it. It's more difficult when you have a client who's basically saying, you know, free me or try me. . . . [but] you got to work through that. You got to talk to them about it, or you got to - you know, what we did was we hired mitigation experts").

only, that Zeitz was so hampered by Marshall's dictates that he could not fulfill his professional duty to prepare a mitigation case prior to the end of the guilt phase, once the jury rendered a guilty verdict, the entire tenor of the case changed. The case was no longer one of proving innocence, rather, it was a case for life. At this point, given the inordinately high stakes, Zeitz had an obligation to request a continuance and conduct a penalty phase investigation, no matter how obstreperous or difficult his client had proven to be in the past. We can discern no reasonable explanation for a decision not to investigate at that point.

Zeitz contends that, although he had not conducted a specific penalty phase investigation, he had sufficient information from his preparation for the guilt phase to make a decision to move forward with the penalty phase. Zeitz claims throughout his testimony that he gathered sufficient information from Oakleigh DeCarlo, conversations with Marshall, and Kolins' investigation for the guilt phase to: (1) craft a strategy for the penalty phase; and (2) present and argue a case for life. *See, e.g.*, Tr. Sept. 3, 2003, Test. of Glenn Zeitz at 40, l. 18-22. Specifically, Zeitz argues that he chose not to present evidence of Marshall's educational background, family obligations and relationships or his involvement in civic and charitable activities because it had already been presented to the jury during the trial. Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 99, l. 19 to 100, l. 25; *Marshall I,* 586 A.2d at 168.

However, we reject not only Zeitz's argument that he conducted an investigation sufficient to permit him to argue that his decisions at the penalty phase were strategic, but also Zeitz's argument that he introduced substantial mitigation evidence in the guilt phase. The purpose of the penalty phase of a trial is to provide the jury with information that permits it to make an "individualized sentencing determination . . . [based on] the character and record of the individual offender and the circumstances of the particular offense." *Perry v.*

Lynaugh, 492 U.S. 302, 316 (1989) (internal citations omitted). Although the New Jersey Supreme Court found that `several defense witnesses at trial provided testimony about petitioner's good reputation in the community and petitioner, himself, testified about `his background, education, family life, and civic activities,'" *Marshall IV,* 103 F. Supp.2d at 791 (citing *Marshall I,* 586 A.2d at 172)), the scope of that testimony is limited at best. The character witnesses to whom the New Jersey Supreme Court refers: Gerald Hughes, Henry Tamburin, Thomas Fenwick, and Lynn Fenwick, provided only general statements regarding Marshall's reputation as a law abiding citizen and an honest man.[55] *See Marshall V,* 307 F.3d at 98. Marshall's testimony regarding his background was equally cursory. Pet. Appendix at 37-45, Guilt-Phase Test. of Robert Marshall (briefly discussing his family history, education, employment and community involvement).

Zeitz's reliance on the testimony of John, Chris and Robby Marshall for a showing that he introduced strong mitigating evidence in the guilt phase is equally misplaced. Their testimony was limited to statements describing how their father sounded during individual phone calls made on the night of September 27, 1984. Neither Robby, nor Chris nor John Marshall ever testified as to their relationship with or feelings toward their father, his involvement in their lives, the harm his execution would cause, or their desire for the jury to spare his life. It was only in the evidentiary hearing before this Court that John Marshall, now 32 years old, had the opportunity to testify about how important his father was and is to him, the relationship he had with his father at the

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[55]For example, Gerald Hughes testified only that Marshall had a reputation as a law abiding, honest professional and an upstanding businessman. Pet. App. at 29-30. Thomas and Lynn Fenwick testified that Marshall had a reputation for being a law-abiding citizen and an honest man. *Id.* at 48.

time of the trial, the relationship he has continued to have with Marshall, and what he would have said if asked to testify as a mitigation witness.

Ultimately, our review of Zeitz's conduct regarding his preparation for the penalty phase compels us to find that his representation was unreasonable under prevailing professional norms in 1986. The Court is satisfied that, at a bare minimum, Zeitz was required to have specific discussions with Marshall and his family members about the possibility of a penalty phase, what a penalty phase entails and a discussion with each person individually as to whether he or she would have been willing to testify and what he or she would have said. By failing to conduct any targeted investigation into potentially mitigating factors and neglecting to consult with his client, Zeitz failed to conduct himself as a reasonable attorney would. Thus, we find that the New Jersey Supreme Court's decision that Zeitz engaged in adequate investigation, consultation and preparation for the penalty phase was an unreasonable application of Supreme Court precedent as articulated in *Strickland.*

b.

With the understanding that Zeitz's failure to investigate a mitigation defense permeates and underlies all aspects of the penalty phase, we now turn to an examination of Petitioner's remaining claims, which challenge the substance of the mitigation case presented by Zeitz. Specifically, Petitioner claims Zeitz's representation was constitutionally deficient because Zeitz failed to introduce mitigating evidence, failed to humanize Marshall to the jury and failed to make a plea for his client's life. Because Zeitz did not engage in a reasonable investigation prior to the penalty phase, his subsequent decisions do not enjoy the same deference as decisions made after proper investigation and preparation. *See Strickland,* 466 U.S. at 690-91; *Wiggins,* 123 S. Ct. at 2535-2539.

Petitioner first contends that Zeitz's representation is unreasonable because he introduced no mitigating evidence in the penalty phase and, thus, failed to humanize his client.[56] However, "[n]o absolute duty exists to introduce mitigating or character evidence." *Chandler,* 218 F.3d at 1319; *see also Burger,* 483 U.S. at 789-796; *Darden,* 477 U.S. at 185-87; *Waters,* 46 F.3d at *1511; Stouffer v. Reynolds,* 168 F.3d *1155,* 1167 (10th Cir. 1999) (allowing that the "decision to present no mitigating evidence may be a tactical one"); Morales v. *Coyle,* 98 F. Supp. 2d 849, 869 (N.D. Ohio 2000). Under existing case law, "the key to the findings of ineffectiveness [is] not that mitigating evidence was not presented, but that counsel, as a result of inadequate preparation, had failed to discover the evidence." *Laws v. Armontrout,* 863 F.2d 1377, 1384-85 (8th Cir. 1988); *see also Strickland,* 466 U.S. at 690-91 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of the investigation"); *Darden,* 477 U.S. at 184-87; *Burger,* 483 U.S. at 789-96; *Stouffer,* 168 F.3d at 1167; *Morales,* 98 F. Supp. 2d at 870. This is not a case where, after reasonable investigation, Zeitz determined that it was tactically a better choice not to put on a mitigation case.[57] Rather, it is a situation where Zeitz

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[56]Although the Third Circuit separated this contention into two separate claims, we are satisfied that the failure to present any mitigating evidence and the failure to humanize Marshall are part and parcel of the same issue.

[57]*See e.g., Deputy v. Taylor,* 19 F.3d 1485, 1493-1495 (3d Cir. 1994) (affirming petitioner's conviction and death sentence where counsel decided not to present testimony of defendant's family members and counselors because it added little to what was already in evidence in the form of

(continued...)

inadequately prepared for the penalty phase and put on no mitigating evidence because he had none to present. Zeitz only provided the jury with a stipulation that Marshall had no prior criminal record and an embarrassingly superficial mention of Marshall's charity work.[58] Therefore, Zeitz's decision was not a reasonable strategic choice, but an abdication of his constitutional duty. Nothing in the record provides a reasonable professional justification to support a decision not to present a case for life.[59]

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[57](...continued)
psychiatric reports).

[58]Zeitz did introduce some arguably humanizing evidence during the guilt phase of the trial, specifically, the three audio tapes Marshall recorded for his sons on the day of his suicide attempt. Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 89, l. 1-15. In the tapes, Marshall told his sons how much he loved them, apologized for leaving them and encouraged them to be successful. *See* Def. Ex. 4. The tapes, however, while they may show that Marshall loved his sons, did not reveal how his sons felt about him. Further, even though Zeitz introduced the tapes, he failed to mention them during his penalty phase closing.

[59]Zeitz suggests that his fears of "opening doors to damaging rebuttal evidence" motivated, in part, his decision not to put on any mitigation witnesses. Tr. Sept. 4, 2003, Test. of Glenn Zeitz at 196, l. 10-24. However, Zeitz admits that, at the time of the penalty phase, he was not aware of any specific rebuttal evidence that the State had. *Id.* at 224, l. 10 to 226, l. 24. Zeitz further acknowledged that had the parties not agreed to truncate the penalty phase, the State would have been obligated to turn over all its rebuttal evidence prior to

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Lastly, Petitioner claims that Zeitz acted unreasonably by failing to plea for Marshall's life. Again, there is no per se rule requiring counsel to make a mercy plea to the jury. *See Strickland,* 466 U.S. at *688* (refusing to adopt per se rules for determining what is reasonable representation); *Bell,* 535 U.S. at 701 (rejecting an ineffective assistance of counsel claim based in part on counsel's failure to make a plea for his client's life); *Chandler,* 218 F.3d at 1317 (stating that "no absolute rules dictate what is reasonable performance for lawyers"); *Romero v. Lynaugh,* 884 F.2d 871, 875-77 (5th Cir. 1989) (affirming the district court's decision that counsel's brief penalty phase closing argument which did not include a plea for his client's life was not deficient where counsel was prepared for and involved in all aspects of the trial and provided the jurors with mitigating evidence); *Marshall I,* 586 A.2d at *173* (noting that what constitutes an effective closing argument in a capital case "depends on the crime, the evidence, the circumstances-in short, the entire record"). However, given the complete lack of investigation prior to the penalty phase and Zeitz's limited and cursory closing statement, Zeitz's decision not to ask the jury to spare his client's life seems incomprehensible. Tr. Sept. 10, 2003,

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[59](...continued)
the hearing, permitting Zeitz to alter his planned presentation to avoid damaging testimony. *Id.* Thus, we are unconvinced that Zeitz's motivation was reasonable and reject the finding of the New Jersey Supreme Court that Zeitz's decision Zeitz's decision to give only a brief closing statement was "formulated in anticipation of the State's response" and that Zeitz strategically chose to not make too much of an emotional appeal. *Marshall IV,* 103 F. Supp. 2d at 793 (citing *Marshall I,* 586 A.2d at 172-73).

Test. of Carl Herman at 68, l. 17-19.[60]

The penalty phase exists to give counsel the opportunity to humanize his client, to show a jury that, despite its belief in his guilt, they should spare his life. *See Marshall V,* 307 F.3d at 103. Where there is little else on the defendant's side, all counsel has is a final plea for mercy. Rather than plea for his client's life, however, Zeitz told a jury which had just found his client guilty two hours earlier: "All I can say is this, that I hope when you individually consider the death penalty, that you're each able to reach whatever opinion you find in your own heart, and that whatever you feel is the just thing to do, we can live with it." We cannot characterize this "verbal shrug of the shoulders" as advocacy, much less find it reasonable representation in the context of a capital murder trial. *Marshall V,* 307 F.3d at 101. Given the absence of any genuine mitigating evidence in the guilt phase and defense counsel's superficial and perfunctory closing statement in the penalty phase, the Court is persuaded that Zeitz's decision not to plead for Marshall's life was unreasonable.[61] Ultimately,

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[60]Indeed, Carl Herman testified that he thought "one of the important disturbing aspects of this case is that, you know, in terms of investigation, preparation, presentation and argument, I've never heard - never heard of a lawyer [except Zeitz] not asking a jury to spare their client's life. It would be like doing a summation in a guilt phase, where you said, you know, you've heard the evidence, ladies and gentlemen, you figure this case out; I can't - whatever you do is fine." Tr. Sept. 10, 2003, Test. of Carl Herman at 68, l. 15-22.

[61]We distinguish Zeitz's performance from that of defense counsel in *Romero,* 884 F.2d at 875. In *Romero,* counsel's closing statement to the jury was limited to the following:

Defense Counsel: I appreciate the time you

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[61](...continued)

> took deliberating and the thought you put into this. I'm going to be extremely brief. 1 have a reputation for not being brief. Jesse, stand up. Jesse?
>
> The Defendant: Sir?
>
> Defense counsel: Stand up. You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say. *Id.*

In *Romero*, the Fifth Circuit rejected the defendant's ineffective assistance of counsel claim, noting that defense counsel engaged in "substantial preparation for trial . . . [and] there is nothing to suggest that any mitigating facts were not before the jury." *Id.* at 877. The *Romero* decision highlights the deference afforded strategic decisions made after thorough investigation. In the instant matter, however, defense counsel engaged in no investigation into mitigation factors. Therefore, his -decisions at the sentencing hearing, such as it was, are not entitled to the same deference. Had Zeitz investigated and prepared fully for both phases of Marshall's capital trial, we would be in accord with the New Jersey Supreme Court's finding that "[i]n the context of this record and the grave offense of which defendant was convicted, a closing argument that focused each juror's attention on his or her moral responsibility for defendant's life or death cannot easily be discredited." *Marshall I,* 586 A.2d at 173. Given Zeitz's decision not to investigate, however, we find his later decision to limit his closing as he did unreasonable. *See, e.g., Dobbs v. Turpin,* 142 F.3d 1383, 1387-1389 (11th Cir. 1998) (finding counsel ineffective where he failed to investigate prior to the penalty phase and made a closing

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Zeitz's performance in the penalty hearing of Marshall's capital murder trial was unreasonable under prevailing professional norms in 1986, and, thus, constitutionally deficient under the Supreme Court's holding in *Strickland.*

C.

Our finding that counsel's performance was deficient according to the prevailing professional norms for capital defense in 1986, however, does not end our review. We must now ascertain whether Petitioner was prejudiced by Zeitz's actions or inactions. *Strickland,* 466 U.S. at 691. "An error by counsel, if professionally unreasonable does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Wiggins,* 123 S. Ct. at 2542.

In New Jersey capital cases,

> [t]he application of the second prong of *Strickland* - the prejudice prong - has a somewhat more subtle application in the penalty phase than in the guilt phase [because New Jersey is a] 'weighing' state . . .. Given the unanimity requirement, the 'reasonable probability of a different outcome' would mean that

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[61](...continued)
argument that did not include a mercy plea, but rather told a jury "to impose a sentence with which they could live"); *Horton v. Zant,* 991 F.2d 1449, 1462-63 (11th Cir. 1991) (finding defense counsel ineffective where counsel did little investigation in preparation for the penalty phase and told the jury "Maybe [defendant] ought to die, but I don't know" rather than making a plea for his client's life).

> only one juror need weight the factors differently and find that the aggravating factor did not outweigh the two mitigating factors; even if the aggravating and mitigating factors were of equal weight, under New Jersey's sentencing scheme, the sentence would be life in prison, not death. *Marshall V,* 307 F.3d at 103-104; N.J. Stat. Ann. § 2C: 11-3c(3).[62]

Thus, Petitioner need only show that there is a reasonable probability that one juror would have found that the aggravating factor failed to outweigh the mitigating factors in order to show prejudice under *Strickland.*

We are satisfied that Petitioner has met his burden to show he was prejudiced by Zeitz's performance. Here, not only did "Zeitz ramble[] his way through the mitigating factors . . . not[ing] only sparse facts, eschewing the notion of going `through a whole litany' in favor of merely characterizing it as a `substantial record,'" *Marshall V,* 307 F.3d at 99-100, but he also failed to investigate or present a significant amount of mitigating evidence. Had competent counsel investigated and presented even a portion of this evidence, there is a reasonable likelihood that the jury would have returned a life sentence. At the time of the sentencing phase of Marshall's trial, counsel had access to a pool of at

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[62]N.J. Stat. Ann. § 2C:11-3c(3) provides:

> The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

least sixteen potential witnesses including one of Marshall's sons, his siblings, friends, neighbors, and clergy who were willing and able to testify on Marshall's behalf. Among those were several close family members and friends who would have asked the jury to spare Marshall's life and would have testified to the harmful impact Marshall's execution would have on his family, particularly his then fifteen-year-old son John.[63] We find it hard to imagine that testimony from, at the very least, Marshall's son and siblings, would not have affected the jury. The type of powerful and emotional testimony likely to have been given by Marshall's family is of a wholly different magnitude than Zeitz's sterile allusions to Marshall's community involvement and prior law-abiding life. Indeed, given that Marshall need have only persuaded

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[63]We reject the State's contention that the mitigating evidence available to Zeitz could not have swayed a jury to spare Marshall's life because it was insufficiently "powerful" or "compelling" and did not present a history of childhood trauma, horrific past abuse, or emotional or psychological deficits. *See* Post-Evidentiary Hr'g Br. Behalf Resp't at 59-64. Although such evidence is, indeed, powerful, noting in the case law suggests that a defendant without such a troubled past cannot satisfy the prejudice prong, nor that different types of evidence cannot be mitigating. *See, e.g., Williams*, 529 U.S. at 396 (describing as mitigating both records of intellectual deficiencies and limited educational achievement and testimony as to defendant's commendations received in prison for help in breaking a drug ring and success in adapting to prison life); *Groseclose v. Bell*, 130 F.3d 1161, 1169-1170 (6th Cir. 1997) (including in potentially mitigating evidence defendant's church involvement, positive military record, and the "plethora of family members willing to testify on his behalf" and finding that counsel's "utter failure to develop or even advert to these mitigating factors" gave rise to a finding of prejudice under *Strickland*).

one juror that the aggravating factor did not outweigh the likely harm to his family, we are satisfied that there is a reasonable probability that the outcome of the penalty phase would have been different had Zeitz conducted a constitutionally sufficient investigation into and presentation of a case for life.[64] *See Williams,* 529 U.S. at 396 (finding counsel's failure to investigate the existence of "voluminous" additional mitigation evidence prejudicial to defendant under *Strickland); see also Jermyn,* 266 F.3d at 311 (finding "the fact that counsel presented some mitigating evidence of a different nature and quality seems largely beside the point, given the significance of the evidence that was omitted and the reasonable likelihood that the totality of the available mitigating evidence . . . might have lead to a different result"); *Groseclose v. Bell,* 130 F.3d 1161, 1169-1170 (6th Cir. 1997); *Collier v. Turpin,* 177 F. 3d 1184, 1201 (11th Cir. 1999). Thus, the New Jersey Supreme Court's determination that Marshall failed to show prejudice under *Strickland* was an unreasonable application of *Strickland. See Marshall III,* 690 A.2d at 82.

Ultimately, Petitioner has satisfied his burden to show both that his counsel's representation was deficient under prevailing professional norms and that he was prejudiced by

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[64]As Justice O'Hern, of the New Jersey Supreme Court noted, "deciding whether a man shall live or die is not the product of building blocks of evidence . . . capital sentencing is ineluctably individualistic." *Marshall I,* 586 A.2d at 199 (O'Hern, J., concurring in part and dissenting in part); *see also Hendricks v. Calderon,* 70 F.3d 1032, 1044 (9th Cir. 1995) (noting that the penalty phase of a capital case "is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability").

counsel's incompetence. The Court has no confidence that the penalty phase of Marshall's trial was a genuine adversarial proceeding, the assurance of which is at the very heart of the right to counsel under the Sixth Amendment. Therefore, we find the New Jersey Supreme Court's determination that counsel was effective an unreasonable application of Strickland.

V.

For the reasons set forth above, this Court will grant Petitioner's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground that he was denied effective assistance of counsel at the sentencing phase of his criminal. trial. Additionally, the Court will vacate Petitioner's death sentence and remand to the state court for a new sentencing hearing to be held within 120 days unless such date is extended by further order of the Court.[65] The Court will issue an appropriate order.

Date: April 8, 2004

JOSEPH E. IRENAS, S.U.S.D.J.

[65]In remanding this matter for resentencing, the Court takes no position on the propriety of conducting a new penalty phase eighteen years after the first. Thus, the Court leaves to the state court any decision on any questions of law that may be raised by conducting a new hearing.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT O. MARSHALL,
Petitioner,
v.
ROY HENDRICKS,
Superintendent, New Jersey State Prison, and
JOHN J. FARMER,
Attorney General of New Jersey,
Respondents.

HONORABLE JOSEPH E. IRENAS
CIVIL ACTION NO. 97-5618 (JEI)

ORDER GRANTING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

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IRENAS, Senior District Judge:

Currently before the Court is Petitioner's application for writ of habeas Corpus pursuant to 28 U.S.C. § 2254. The Court having considered the submissions of the parties, and having held an evidentiary hearing, and for the reasons set forth in an Opinion which findings of fact and conclusions of law are incorporated herein by reference, and for good cause appearing,

IT IS on this 8th day of April, 2004,

ORDERED THAT:

1. Petitioner's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **GRANTED** on the ground that he was denied effective assistance of counsel at the penalty phase of his capital murder trial.

2. Petitioner's death sentence is **VACATED**.

3. The within matter is remanded to Superior Court of New Jersey, Criminal Division, Atlantic County for a new sentencing hearing to be held within 120 days unless such date is extended by further order of the Court.

JOSEPH E. IRENAS, S.U.S.D.J.